Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-10

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY, *Appellants*,
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees*,

No. _____

CONTINENTAL OIL COMPANY AND
KAYO OIL COMPANY, *Appellants*,
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees*,

No. _____

SHELL OIL COMPANY, *Appellant*,
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees*,

No. _____

GULF OIL CORPORATION, *Appellant*,
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees*,

No. _____

ASHLAND OIL, INC., COMMONWEALTH OIL
REFINING COMPANY, INC., AND PETROLEUM
MARKETING CORPORATION, *Appellants*,
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees*.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## JOINT APPENDIX TO JURISDICTIONAL STATEMENTS

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## APPENDIX A

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*In the Court of Appeals of Maryland*

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*No. 10*

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*September Term, 1976*

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*Governor of the State of Maryland, et al.*

*v.*

*Exxon Corporation, et al.*

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Argued before Murphy, C. J., and Smith, Digges, Levine and Eldridge, JJ., and James C. Morton, Jr., and Ridgely P. Melvin, Jr., Associate Judges of the Court of Special Appeals, specially assigned.

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Decided February 18, 1977

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ELDRIDGE, J.:

In this case we are presented with several questions concerning the constitutionality of Chapter 854 of the Laws of Maryland of 1974, as amended by Chapter 608 of the Laws of 1975, and codified in Maryland Code (1957, 1972 Repl. Vol., 1976 Cum. Supp.), Art. 56, § 157E. These chapters added the following provisions to the Motor Fuel Inspection Law (italicized portions are those added by Chapter 608 of the Laws of 1975):

> "(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service

station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*

"(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*

"(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

"(E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

"(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

"(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

"(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts."



In addition to the authority granted in Paragraphs G and H to promulgate rules and regulations for the temporary operation of retail service stations by producers and refiners, and to permit reasonable exceptions to the specified divestiture dates, *see* 2 Maryland Register 228, the Comptroller has the power generally to promulgate rules and regulations for the administration of the Motor Fuel Inspection Law, Art. 56, § 157B(a). Additionally, the Comptroller may direct those marketing petroleum products in violation of the Motor Fuel Inspection Law or regulations adopted pursuant thereto to cease such violations. If the violations should continue, the Comptroller shall refer the matter to the Attorney General who is authorized to apply to the circuit courts for an injunction against the continuance of the violations, Art. 56, § 157B(b). There are also criminal penalties for violation of the Motor Fuel Inspection Law, Art. 56, § 157K.

Chapter 854 was signed into law on May 31, 1974, effective July 1, 1974. On June 17, 1974, Exxon Corporation instituted an action in the Circuit Court for Anne Arundel County seeking a declaratory judgment pursuant to the Maryland Uniform Declaratory Judgments Act, Code (1974), § 3-401 *et seq.* of the Courts and Judicial Proceedings Article, that Chapter 854 be declared unconstitutional and invalid. Additionally, Exxon sought injunctive relief prohibiting enforcement of Ch. 854. Defendants in the action were the Governor of Maryland, the Attorney General of Maryland, and the Comptroller of the Treasury of Maryland.

Thereafter Continental Oil Company and its subsidiary Kayo Oil Company, Shell Oil Company, Gulf Oil Corporation, Phillips Petroleum Company, Commonwealth Oil Refining Company, Inc. and its subsidiary Petroleum Marketing Corporation, and Ashland Oil, Inc., filed substantially similar actions, and all actions were consolidated for trial. The plaintiffs either directly or through their subsidiaries are all engaged in the direct retail marketing of petroleum products in the state of Maryland. All, with the exception of Common-

wealth and Ashland, are large multi-national, fully integrated oil companies engaged in the production, refining, transportation and marketing of petroleum products. Commonwealth is a refiner dependent solely upon foreign crude oil supplies, and markets gasoline through its wholly owned subsidiary, Petroleum Marketing Corporation. Ashland is primarily a refiner and marketer of petroleum products, but does engage in some limited production of crude oil.[1] Additionally, four independent retail dealers of Crown Central Petroleum Corporation were permitted to appear in support of the Act as *amici curiae.*

The substance of the oil companies' attack on the validity of Chapter 854 is fairly represented by the allegations in Exxon's complaint. The Act was challenged on several grounds. Exxon alleged that the Act did not bear a real and substantial relationship to the health, safety, morals or welfare of the people of Maryland and thus denied it due process of law in violation of Art. 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution; that the Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause, Art. 1, § 8 of the United States Constitution; that the Act constituted a taking of its investment in retail service stations without just compensation in violation of Art. III, § 40 of the Maryland Constitution and the just compensation clause of the Fifth Amendment to the United States Constitution; that the Act, in prohibiting only producers and refiners of petroleum products from engaging in the retail sale of gasoline, denied them the equal protection of the laws in violation of Art. 23 and the Fourteenth Amendment; and that the provisions of the Act authorizing the Comptroller to issue rules and regulations permitting exceptions to the divestiture dates and allowing temporary operation of retail service stations by producers and refiners failed to set forth

[1] The plaintiffs are hereafter sometimes referred to as "the oil companies."



any standards to guide the Comptroller, and thus constituted an unlawful delegation of legislative authority in violation of Art. 8 of the Maryland Declaration of Rights. Additionally, it was alleged that the provision of the Act providing for equitable allocation of petroleum products was in conflict with the Federal Emergency Petroleum Allocation Act of 1975, 15 U.S.C. 751 *et seq.*, that the provision of the Act requiring uniform "voluntary allowances" was in conflict with the Robinson-Patman Act, 15 U.S.C. 13, and that, therefore, both provisions were invalid under the Supremacy Clause of Art. VI of the United States Constitution. Finally, it was alleged that certain provisions of the Act are void for vagueness.

On May 5, 1975, the circuit court, after a pre-trial conference, entered an order prohibiting the defendants from enforcing the provisions of Chapter 854 against the plaintiffs while the cases were pending. Plaintiffs were ordered not to open any new retail service stations operated with company personnel nor to convert existing retail service stations to direct company operation without first notifying defendants of their intention to do so and reasons therefor. Motions for partial summary judgment were then filed by Exxon, Shell and Gulf with respect to those provisions of the Act requiring uniform "voluntary allowances" (Paragraph D) and uniform allocation of products during periods of shortages (Paragraph F) on the ground that both were in conflict with federal law. The motion was granted with respect to Paragraph D on October 14, 1975. The case then proceeded to trial on the remaining issues.

Extensive evidence was presented at trial relating to the nature of the retail marketing of gasoline and petroleum products in Maryland and the alleged effect that the Act would have on the industry. Oil company officials, either by live testimony or by affidavits, testified that the Act would have an adverse effect insofar as the consumer is concerned. They testified that by prohibiting producers and refiners from

operating retail service stations, producers and refiners would lose the necessary control over operations to guage accurately consumer preferences for such innovative features as self-service stations, car wash facilities, and total car care service facilities offering a national guarantee, thus allegedly depriving the consumers in Maryland of the wide variety of automotive services now available. They also testified that company operated stations[2] serve as training centers for independent dealers, insuring that consumers will be served by efficient, courteous and knowledgeable personnel at non-company operated stations. Additionally, executives of the three companies who market solely through company operated stations asserted that their type of low price-high volume stations could not be economically run with non-company personnel, and that, in all probability, they would be forced to withdraw from the Maryland market if the Act were to become effective. Four economists, qualified as expert witnesses, also testified on behalf of the oil companies in opposition to the Act. In general, they believed the Act would reduce competition and would therefore be detrimental to the interests of the consumer. This reduction of competition would occur because, in their view, the Act would inhibit new competitors from entering the market, force existing, highly aggressive independent marketers such as Petroleum Marketing Corporation and Commonwealth out of the market, and would also limit the variety of auxiliary services available to consumers by discouraging tests of innovative marketing techniques.

The State presented as its expert witness Dr. James M. Patterson, a professor of Business Administration, who is the author of two books on gasoline marketing.

[2] As used in this opinion, "company operated station" refers to a retail service station operated directly by employees of a refiner or producer of petroleum products, or a subsidiary of a refiner or producer. It does not refer to retail service stations operated by a company engaged only in the marketing of petroleum products.



He testified that in his opinion the Act would actually enhance competition in gasoline marketing. Elimination of company operated stations would preserve "intertype competition," which he described as competition among the various types of competitors in the marketplace such as private brand, non-integrated, and major brand marketers. On the other hand, increased company operation of service stations would, in his view, enable major integrated oil companies to use increased profits, resulting from the recent increases in crude oil prices, to drive various "price competitors" from the market as well as divert available gasoline supplies from independent, unbranded marketers. Such actions would, eventually, reduce overall competition in gasoline marketing. Evidence was also adduced by the State to show that several partially or fully integrated oil companies planned either to increase the number of company operated stations or to convert all stations to company operations. This, the State argued, tended to support Dr. Patterson's opinion that the major oil companies would seek to reduce competition among gasoline marketers by reducing the number of competitors.

Significant evidence concerning the history and purpose of Chapter 854 was also presented. On June 13, 1973, the Governor requested that the Comptroller conduct a study of gasoline retailing in Maryland. The purpose of the study was to determine if the then existing shortage of fuel was real or contrived, and also to determine whether company owned and operated service stations were receiving larger allocations of gasoline than dealer operated or independent stations. This request was motivated by the large number of complaints received by the Governor's office concerning the availability of gasoline, and the fact that some brands of gasoline appeared to be available in unlimited quantities while other brands were available only in limited quantities. On June 29, 1973, questionnaires prepared by the Gasoline Tax Division of the Comptroller's office were sent to registered gasoline service

stations in the state. The results of this survey were tabulated, and a written analysis of the survey entitled "Results and Analysis of Service Station Dealers Questionnaire" was submitted to the Governor on September 6, 1973.

The results of the survey were tabulated according to the type of service station responding to the questionnaire. Service stations were divided into four categories: retail service stations leased to a dealer by a major oil company; independently owned stations operated under a major brand; unbranded stations; and company operated stations. According to the survey, company operated stations were "either unrestricted in their purchases or were allocated 100% of their needs." Independently owned stations operated under a major brand name, however, were characterized as the "most abused" category, with a wide fluctuation in the percentage allocation based upon prior year purchases. According to the report, many were forced to close or restrict hours of operation because of decreased product availability. Unbranded stations and major stations leased to dealers fared better than independently owned stations, but both categories experienced reduced allocations from suppliers. The report concluded that company operated stations "were virtually unaffected insofar as gasoline availability was concerned" while both branded and unbranded independents experienced "the greatest difficulty in obtaining gasoline" and the "greatest cost per gallon increase."

Subsequent to submission of the report to the Governor, and after several discussions with the Governor, the Comptroller's office forwarded proposed legislation to the Governor on January 7, 1974, designed to correct the inequities in the distribution and pricing of gasoline reflected by the survey. Bills identical to the proposed legislation drafted by the Comptroller's office were introduced in both houses of the General Assembly.



The bills were then referred to the Senate Economic Affairs Committee and the House Economic Matters Committee, and both committees held public hearings on the bills. Representatives of the major oil companies appeared at both hearings in opposition to the proposed legislation. They denied allegations that the shortage of gasoline was contrived and that company operation of service stations promoted inequitable product allocation, cancellation of dealer leases and control of retail prices. The oil company representatives believed that implementation of the legislation would decrease competition and would therefore be detrimental to the interests of Maryland consumers. Proponents of the bills also appeared at the hearings, including a representative of the Greater Washington/Maryland Service Station Association. He cited several recent examples of cancellations of dealer leases and conversions to company operation, as well as reduced allocation of products to dealers, to support his allegations that the major oil companies intended to control and monopolize retail marketing of gasoline by reducing and eliminating competition from independent dealers. Furthermore, he referred to a congressional report on the federal Petroleum Allocation Act expressing a similar concern over increased involvement of major oil companies in the retail marketing of gasoline. *See* Conference Report No. 93-628, 93d Cong., 1st Sess., *reprinted in* [1973] U. S. Code Cong. & Ad. News, 2688, 2707. The Comptroller also appeared in support of the Act, and submitted copies of his report and analysis of the dealer questionnaires to both committees.

The House and Senate Committees reported favorably on the bills. Both bills were amended by the removal of a prohibition against wholesalers operating retail service stations and by the addition of the provision authorizing the Comptroller to adopt rules and regulations permitting temporary operation of stations by producers and refiners. In addition, the Senate bill was amended so as to authorize the Comptroller to allow reasonable exceptions to the

divestiture dates specified in the bill. Both bills were then passed during the 1974 session of the General Assembly and submitted to the Governor for his approval. The Governor held a special veto hearing on the bills at which both proponents and opponents again testified. Thereafter, the House bill was vetoed, Laws of Maryland of 1974, pp. 3137-3138, and the Senate bill was signed into law by the Governor, becoming Chapter 854 of the Laws of Maryland of 1974.

At the conclusion of the trial, the circuit court filed a decree declaring that Chapter 854 of the Laws of 1974 and Chapter 608 of the Laws of 1975 were unconstitutional and void. An injunction was also filed, enjoining the defendants from enforcing the statutes. Although the circuit court's holding was based primarily on the ground that the Act violated the due process clauses, the court also indicated that the Act was invalid for several other reasons raised by the oil companies. The defendants appealed from the judgment to the Court of Special Appeals, and we issued a writ of certiorari prior to a decision by the Court of Special Appeals.

On this appeal, the oil companies reiterate their challenge to the Act on all of the constitutional grounds raised below.

(1) *Due Process*

The oil companies' main attack upon the statute is on so-called "substantive due process" grounds. They contend, as the trial court held, that the divestiture provisions of the Act (Paragraphs B and C) are an invalid exercise of the State's police power in violation of the Due Process Clause of the Fourteenth Amendment and Art. 23 of the Maryland Declaration of Rights.[3]

This Court has on numerous occasions in recent years discussed the standards applicable when the constitu-

[3] Art. 23 of the Maryland Declaration of Rights provides that "[n]o man ought to be . . . deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." As we pointed out last term in Westchester West



tionality of economic regulatory legislation is challenged on substantive due process grounds. *Westchester West No. 2 v. Mont. Co.*, 276 Md. 448, 348 A.2d 856 (1975); *Steuart Petroleum Co. v. Board*, 276 Md. 435, 347 A.2d 854 (1975); Bowie Inn v. City of Bowie, 274 Md. 230, 335 A.2d 679 (1975); *Md. St. Bd. of Barber Ex. v. Kuhn*, 270 Md. 496, 312 A.2d 216 (1973); *Md. Bd. of Pharmacy v. Sav-A-Lot*, 270 Md. 108, 311 A.2d 242 (1973); *Salisbury Beauty Schools v. St. Bd.*, 268 Md. 32, 300 A.2d 367 (1973); *Potomac Sand & Gravel v. Governor*, 266 Md. 358, 293 A.2d 421, *cert. denied*, 409 U.S. 1040, 93 S. Ct. 525, 34 L. Ed. 2d 490 (1972); *Brooks v. State Board*, 233 Md. 98, 195 A.2d 728 (1963); *Allied American Co. v. Comm'r.*, 219 Md. 607, 150 A.2d 421 (1959). Recent Supreme Court decisions in this area are *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973); *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93, 95 A.L.R.2d 1347 (1963); and *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955).

Last term, in *Westchester West No. 2 v. Mont. Co., supra*, 276 Md. at 454-455, in holding that a Montgomery County rent control law did not violate the Due Process Clause of the Fourteenth Amendment or Art. 23 of the Maryland Declaration of Rights, we discussed the function of the courts in reviewing regulatory legislation alleged to be violative of the due process clauses. We emphasized that the function of the courts in this area is "very limited," and went on to say (276 Md. at 455):

> "Unless the exercise of the police power by the Legislature is shown to be arbitrary, oppressive or

No. 2 v. Mont. Co., 276 Md. 448, 465 n. 11, 348 A.2d 856, 866 (1975),

> "This Court has long equated Art. 23 with the Due Process Clause of the Fourteenth Amendment. *E.g.*, Bowie Inn v. City of Bowie, *supra*, 274 Md. at 235 n. 1; In re Easton, 214 Md. 176, 187, 133 A.2d 441 (1957); Solyuca v. Ryan & Reilly Co., 131 Md. 265, 270, 101 A. 710 (1917); Pub. S. Com. v. N. C. Rwy. Co., 122 Md. 355, 386, 90 A. 105 (1914); Baltimore Belt R.R. v. Baltzell, 75 Md. 94, 99, 23 A. 74 (1891)."

unreasonable, the courts will not interfere with it. *Bowie Inn v. City of Bowie, supra,* 274 Md. at 236; *Salisbury Beauty Schools v. St. Bd., supra,* 268 Md. at 48. Moreover, the wisdom or expediency of a law adopted in the exercise of the police power of a state is not subject to judicial review, and such a statute will not be held void if there are any considerations relating to the public welfare by which it can be supported. *Bowie Inn v. City of Bowie, supra,* 274 Md. at 236; *Sav-A-Lot, supra,* 270 Md. at 106; *Salisbury Beauty Schools v. St. Bd., supra,* 268 Md. at 48."

Judicial deference to legislative judgment is appropriate when reviewing legislation dealing with economic problems. In *Ferguson v. Skrupa, supra,* in holding constitutional a statute permitting only attorneys to engage in the business of debt adjustment, the Supreme Court said (372 U.S. at 730-732, 83 S. Ct. at 1031-1032):

"We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'

* * * * * *

". . . We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws,



regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' "

And as was said in *Williamson v. Lee Optical Co., supra,* 348 U.S. at 488, 75 S. Ct. at 464, quoted by us recently in *Steuart Petroleum Co. v. Board, supra,* 276 Md. at 447, the wisdom of the Act is not for us to judge as "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

A statute enacted by the Legislature in the exercise of the police power "is presumed to be valid and one attacking its validity has the burden of affirmatively and clearly establishing its invalidity." *Salisbury Beauty Schools v. St. Bd., supra,* 268 Md. at 48. While the oil companies have presented evidence questioning the wisdom of the Act and perhaps raising doubts as to the efficacy of the Act in achieving its purpose of preserving a highly competitive retail gasoline market, they have failed to meet their burden. It has not been demonstrated that the Act is "arbitrary" or that there are no "considerations relating to the public welfare by which it can be supported." Quite to the contrary, the history of Chapter 854 establishes that it was the product of a careful and deliberate process involving a study of retail marketing of gasoline products in Maryland as well as three public hearings at which opponents of the Act including some of those now challenging it, were able to present their objections to both the Legislature and the Governor.

The oil companies do not contend that the Legislature may not under any circumstances limit the nature of business which they may conduct in the state. *See, e.g., Daniel v. Family Ins. Co.,* 336 U.S. 220, 69 S. Ct. 550, 93 L. Ed. 632, 10 A.L.R.2d 945 (1949); *Asbury Hospital v. Cass County,* 326 U.S. 207, 66 S. Ct. 61, 90 L. Ed. 6 (1945); *Brooks v. State Board, supra.* Rather, the oil companies ask us to review the evidence concerning the

*possible* effect of the Act and to substitute our judgment for that of the Legislature.

In *Bowie Inn v. City of Bowie, supra,* we were presented with a similar situation. There, the city council of Bowie, in order to control a problem of roadside litter, enacted an ordinance, after a public hearing, requiring a deposit to be collected on all soft drink and malt beverage containers which would be refunded upon return of the container. There, as here, those challenging the ordinance offered evidence that the ordinance would not be effective in achieving its stated goal, and asked the Court to decide from such evidence that the city council acted arbitrarily and unreasonably. We rejected this contention in light of evidence presented to the city council that there was a need for litter control and in view of the fact that the means adopted by the city council could conceivably be effective in reducing the problem of litter.

Here the Legislature was presented with evidence that refiners and producers were favoring company operated stations in the allocation of gasoline. The Comptroller's report showed that, because of the inability to obtain adequate supplies of gasoline, some service station dealers were forced to close. Evidence was also presented that many dealer operated stations were being converted to company operation. The Legislature could reasonably conclude that control of the retail gasoline market by producers and refiners would decrease competition and that the continued existence of independent retail dealers was necessary to preserve competition.[4] Exclusion of producers and

[4] The oil companies contend that the effect of the Act will be to reduce competition by excluding from the market certain aggressive competitors. The Legislature, however, has determined that competition from producers and refiners could ultimately result in the destruction of a competitive retail gasoline market. In Blum v. Engelman, 190 Md. 109, 115, 57 A.2d 421 (1948), in upholding the validity of the Maryland Unfair Sales Act, this Court noted that certain competitive practices may be harmful to the public welfare, and that the Legislature is "free to adopt whatever economic



refiners may conceivably be a reasonable means of preserving competition and preventing monopolistic control of gasoline marketing by a few large oil companies. Divestiture of retail gasoline stations by producers and refiners as a means of preserving competition in retail gasoline marketing recently has been recommended by at least two congressional committees. *See* H. R. Rep. No. 94-1762, 94th Cong., 2d Sess. (1976); S. Rep. No. 94-1005, 94th Cong., 2d Sess. (1976). Indeed, in *Federal Trade Comm'n v. Sun Oil Co.,* 371 U.S. 505, 528, 83 S. Ct. 358, 371, 9 L. Ed. 2d 466 (1963), the Supreme Court recognized that elimination of retail service station dealers through forward vertical integration may be an "evil" requiring legislative action.

The oil companies have presented evidence which casts some doubt on the wisdom of the Act. The State's expert witness conceded that the Act, by excluding certain partially integrated marketers, could in some respects be anti-competitive, although he believed that it would, on the whole, promote competition. However, as discussed above, the courts may not substitute their judgment for that of the Legislature. Especially where reviewing legislation dealing with a serious problem in a new and untried fashion, the courts are under a special duty to respect the legislative judgment as to the proper means of solving the problem. Legislation prohibiting operation of retail service stations by producers and refiners of petroleum has been proposed in several states as well as in Congress but only recently has been enacted by several states. *See* Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment,* 28 Vand. L. Rev. 1277 (1975). As of now there has been no evidence by which to judge the effects of these statutes and predictions as to the effects of the Act are at best

policy may reasonably be deemed to promote public welfare, whether by promoting free competition by statutes aimed at monopolies or by curbing harmful competition . . . ." *See also* Goldsmith v. Mead Johnson & Co., 176 Md. 682, 7 A.2d 176 (1939), which upheld the Maryland Fair Trade Act.

speculative. In *Bowie Inn v. City of Bowie, supra,* we commented on the importance of permitting new legislation to be tested, as follows (274 Md. at 237-238):

> "Here, invalidation of the ordinance would deprive the City Council of Bowie and any other legislative body contemplating such a law of any opportunity to discover whether the ordinance will be good, bad or indifferent in its results. The words of Mr. Justice Frankfurter in *American Federation of Labor v. American Sash and Door Co.,* 335 U.S. 538, 553, 69 S. Ct. 258, 265, 93 L. Ed. 222, 6 A.L.R.2d 481 (1949) (concurring opinion), are particularly appropriate:
>
> > 'Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophesy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests — the people.'"

For these reasons, we hold that the court below erred in holding that the Act was violative of the Due Process Clause of the Fourteenth Amendment or Art. 23 of the Maryland Declaration of Rights.

(2) *Commerce Clause*

The oil companies also contend that the divestiture provisions of the Act are invalid under the Commerce Clause, Art. I, § 8 of the United States Constitution. The companies argue that the purpose of the Act is to protect local retail service station operators from competition by those engaged in interstate commerce. To accomplish this purpose, it is contended that the Act



denies out-of-state competitors access to local retail gasoline markets and thus discriminates against interstate commerce. In support of this contention, the oil companies rely on *H. P. Hood & Sons v. DuMond,* 336 U.S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949).

The Supreme Court has on several occasions struck down state statutes regulating the production and sale of a commodity as violative of the Commerce Clause where it has found that the purpose and effect of the statute was solely to protect local economic interests by discriminating against interstate commerce. In *Baldwin v. G.A.F. Seelig,* 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 A.L.R. 55 (1935), a New York statute establishing a minimum price to be paid out-of-state producers of milk to be sold locally was held unconstitutional. The Court found that the practical effect of the statute was to protect local producers from competition by excluding milk produced in other states from the New York market. Another New York statute was held unconstitutional in *H. P. Hood & Sons v. DuMond, supra.* There the statute granted the State Commissioner of Agriculture the authority to deny milk processors a license to operate milk receiving and processing plants if it were found that such plants would lead to "destructive competition in a market already adequately served." The petitioner, a milk processor who operated several receiving and processing plants in New York for milk to be sold in Massachusetts, was denied a license to operate a new facility. The Court determined that a license was denied to prevent exportation of milk from New York during a time when there was a temporary shortage of milk in the area in which the plant was to be located. Relying on the principle that the states may not "advance their own commercial interests by curtailing the movement of articles of commerce," the Court held that the statute as applied violated the Commerce Clause and was therefore unconstitutional. 366 U.S. at 535.

Similarly, in *Dean Milk Co. v. Madison,* 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951), the Court held

unconstitutional a municipal ordinance which prohibited the sale of pastuerized milk in the city of Madison, Wisconsin, unless processed and bottled within a five mile radius of the center of town and which required that the source of supply of all milk be inspected by city officials, but which imposed a twenty-five mile limit on the area in which inspectors would travel. The petitioner was an Illinois corporation whose milk supply and processing plants were outside of the geographic limitations imposed by the ordinance. While recognizing that the city had a legitimate interest in protecting the health of its citizens by insuring that only wholesome milk be sold within its boundaries, the Court found that the ordinance, as in *Baldwin v. G.A.F. Seelig, supra,* had the effect of excluding importation of wholesome milk produced out of state. Thus, the ordinance discriminated against interstate commerce by "erecting an economic barrier protecting a major local industry against competition from without the state" in violation of the Commerce Clause. 340 U.S. at 354.

A feature common to all three of these regulatory schemes was that they burdened the free flow of goods in commerce between the states by effectively hindering either the import or export of goods. And whether this burden on the movement of goods be direct and apparent on the face of the statute as in *Baldwin v. G.A.F. Seelig, supra,* or indirect as in *H. P. Hood & Sons v. DuMond, supra,* and *Dean Milk Co. v. Madison, supra,* the Court could conclude that the purpose and effect of the statute was primarily to protect a local industry by discriminating against interstate commerce. The Maryland statute here under consideration, however, differs in several substantial ways.

*First,* Chapter 854 would not in any way restrict the free flow of petroleum products into or out of the state. The Act merely regulates a wholly intrastate activity,the retail marketing of gasoline within the state. Producers and refiners would still remain free to import and sell petroleum products to wholesalers and to retail



service station dealers. The only restriction is that producers and refiners may not operate retail service stations in Maryland with their own employees but must do so with retail service station dealers.

*Second,* although the oil companies contend that the purpose of the Act was to protect local economic interests from the competition of oil companies engaged in interstate commerce, in view of the legislative history of the Act we cannot agree with this contention. There is every indication that the purpose of the statute was to preserve competition within the retail gasoline marketing industry in Maryland. As previously discussed, the Comptroller's report, as well as other evidence presented to the Legislature, indicated that company operated stations received greater allocations of gasoline during a period of shortage than did dealer operated stations, forcing many dealers out of business. Moreover, there was evidence that the oil companies intended to increase the number of company operated stations. The General Assembly, after considering the activities of producers and refiners in the industry, concluded, as have several congressional committees, that the recent trend of increased direct operation of service stations by producers and refiners, if allowed to continue, could substantially decrease competition and lead to the control of that market by a few major oil companies. *See* H. R. Rep. 94-1762, 94th Cong., 2d Sess. 28 (1976); H. R. Rep. No. 1423, 84th Cong., 1st Sess. 17 (1955). Thus, the purpose was not to protect Maryland interests from out-of-state competition.

*Finally,* the Act does not in effect discriminate against out-of-state economic interests as opposed to local interests. The Act is equally applicable to all producers and refiners. While oil is not produced in Maryland, and is not presently being refined in Maryland, there are producers or refiners which are Maryland corporations, or are headquartered here, or have substantial facilities here, or do a significant portion of their business here. All such "Maryland" businesses are prohibited by the Act from operating

retail service stations. If a refiner were to build refineries in Maryland, and were to engage in business solely within Maryland, it would be prohibited by the Act from marketing through a company operated station. On the other hand, out-of-state and Maryland retailers are treated the same. An out-of-state marketer not engaged in producing or refining may continue to market in Maryland through retail service stations operated with company personnel.

The only Supreme Court case of which we are aware which considers a challenge to a state divestiture statute on Commerce Clause grounds is *Crescent Oil Co. v. Mississippi*, 257 U.S. 129, 42 S. Ct. 42, 66 L. Ed. 166 (1921).[5] There, a Mississippi statute prohibited both out-of-state and Mississippi corporations engaged in the manufacture of cotton seed oil or cotton seed meal from owning or operating cotton gins. It was argued that the statute was enacted because the legislature believed that manufacturers of cotton seed oil or meal, if also allowed to operate cotton gins, would depress the price charged for ginning in order to suppress competition in the ginning industry. The petitioner contended that the statute imposed a direct and unconstitutional burden on interstate commerce. The Court rejected this contention, pointing out that the statute regulated only a manufacturing process conducted within the state.

In holding in *Crescent Oil* that the Mississippi statute did not violate the Commerce Clause, the Supreme Court noted that the activity to be regulated was intrastate manufacturing and not interstate commerce. While we recognize that the distinction between "manufacturing" and "commerce" is no longer the test

[5] *See also* Paramount Pictures v. Langer, 23 F. Supp. 890, 895 (D. N.D. 1938, *remanded with directions to dismiss on grounds of mootness*, 306 U.S. 619, 59 S. Ct. 641, 83 L. Ed. 1025 (1939), where a statute prohibiting the operation of motion picture theaters in the state of North Dakota which were owned, controlled, or managed by producers or distributors of motion picture films was held not to violate either the due process clause or the equal protection clause of the Fourteenth Amendment or the Commerce Clause.



of *congressional* power to regulate activities under the Commerce Clause, *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942), it may be of some significance in determining a *state's* authority. The fact that Congress may regulate in this area does not necessarily result in the loss of the state's power to regulate an intrastate activity which may possibly have some effect on interstate commerce. The Supreme Court, in *Cities Service Co. v. Peerless Co.*, 340 U.S. 179, 186-187, 71 S. Ct. 215, 219-220, 95 L. Ed. 190 (1950), stated:

> "The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. *Cooley v. Port Wardens*, 12 How. 299 (1851). It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. *Parker v. Brown*, 317 U.S. 341 (1943); *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939); *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938). The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation. *South Carolina Highway Dept. v. Barnwell Bros., supra.*"

*See also Huron Cement Co. v. Detroit*, 362 U.S. 440, 443-444, 80 S. Ct. 813, 4 L. Ed. 2d 852, 78 A.L.R.2d 1294 (1960); *Breard v. Alexandria*, 341 U.S. 622, 634, 71 S. Ct. 920, 95 L. Ed. 1233, 35 A.L.R.2d 335 (1951); *Panhandle Co. v. Michigan Comm'n*, 341 U.S. 329, 71 S. Ct. 777, 95 L. Ed. 993 (1951); *Bowie Inn v. City of Bowie, supra*, 274 Md. at 244-245.

More recently, the Court has indicated that in determining the validity of a state statute affecting interstate commerce, a balancing of the state interest involved in relation to the burden imposed upon interstate commerce may sometimes be appropriate. This "weighing test" was described in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), as follows:

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit,* 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co. v. Arizona,* 325 U.S. 761, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. See, *e.g., Shafer v. Farmers Grain Co., supra* [268 U.S. 189]."

Applying these principles, we conclude that the divestiture provisions of the Act do not violate the Commerce Clause. The Act does not discriminate against interstate commerce as all producers and refiners, whether in or out of the state, are affected equally. The promotion of the economic welfare is a legitimate interest of a state, *Pike v. Bruce Church, Inc., supra,* 397 U.S. at 143; *Parker v. Brown,* 317 U.S. 341, 363, 63 S. Ct. 307, 87 L. Ed. 315 (1943), and it has long been recognized that the states have the power to pass legislation to promote competition by preventing



monopolistic activity in restraint of trade, *Watson v. Buck,* 313 U.S. 387, 403-404, 61 S. Ct. 962, 85 L. Ed. 416, 136 A.L.R. 1426 (1941); *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 107, 29 S. Ct. 220, 53 L. Ed. 417 (1909).

The record, on the other hand, fails to establish that the Act will, to a significant degree, burden interstate commerce. The allegations of the oil companies that the restrictions placed on producers and refiners will limit the availability of products and services to those traveling in interstate commerce is, at best, highly speculative. *Bowie Inn v. City of Bowie, supra.* Most of the producers and refiners have in the past operated only a small percentage of the retail service stations which they supply. The vast majority of retail service stations in Maryland, supplying both interstate and intrastate travelers, are operated by independent dealers.[6] It is true that three of the oil companies involved in this action do market exclusively through company operated stations,[7] and officials of these companies indicated at trial that they might be forced to withdraw from the Maryland market if the Act were to become effective. However, at least two of these company witnesses on cross-examination indicated that no firm decision had been made to withdraw if the Act were to become effective, and that it still might be possible to distribute products in Maryland both

[6] For example, according to facts stipulated by the parties, as of July 1, 1974, of the 632 stations affiliated with Exxon Corporation in the state of Maryland, only 36 were company operated. Similarly, only 1 of 219 stations affiliated with Gulf Oil Corporation was company operated. Phillips Petroleum Company, with 131 Maryland stations, operated only 13 with company personnel. Shell Oil Company had 284 Maryland affiliated stations, but only 1 was company operated. Texaco, Incorporated, which had 307 affiliated stations in Maryland as of July 1, 1974, had no station operated with company personnel.

[7] Ashland Oil, Inc.; Kayo Oil Company; Petroleum Marketing Corporation. As of July 1, 1974, Ashland had 19 stations in Maryland; Kayo, 16 stations; and Petroleum Marketing Corporation, 21 stations.

through dealer operations and on the wholesale market. It therefore appears that there will be no significant disruption of the flow of petroleum products into the state nor in the distribution of those products to those in interstate commerce. We believe that the state's interest, as determined by the Legislature, outweighs any slight burden which the Act may impose on interstate commerce.

For all of the above reasons, the divestiture provisions of the Maryland Act are not unconstitutional under the Commerce Clause.

(3) *Unconstitutional Taking*

The trial court held that the divestiture provisions of the Act constitute a taking of private property without just compensation, in violation of Art. III, § 40 of the Maryland Constitution and the just compensation clause of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment.

For government restriction upon the use of property to constitute a taking in the constitutional sense, so that compensation must be paid, the restriction must be such that it essentially deprives the owner of all beneficial uses of his property. As this Court stated in *Baltimore City v. Borinsky,* 239 Md. 611, 622, 212 A.2d 508 (1965):

> "The legal principles whose application determines whether or not the restrictions imposed . . . on the property involved are an unconstitutional taking are well established. If the owner affirmatively demonstrates that the legislative or administrative determination deprives him of all beneficial use of the property, the action will be held unconstitutional. But the restrictions imposed must be such that the property cannot be used for any reasonable purpose. It is not enough for the property owners to show that the . . . action results in substantial loss or hardship."



*Goldblatt v. Hempstead,* 369 U.S. 590, 592, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168, 78 S. Ct. 1097, 1104, 2 L. Ed. 2d 1228 (1958); *Bureau of Mines v. George's Creek,* 272 Md. 143, 165, 321 A.2d 748 (1974); *Rockville v. Stone,* 271 Md. 655, 663-664, 319 A.2d 536 (1974).

The Maryland Act, in prohibiting producers and refiners from directly operating retail service stations, clearly does not constitute a "taking" in the constitutional sense. The divestiture provisions of the Act do not deprive producers and refiners owning retail service stations of all beneficial uses of their property, or even of the existing and presumably most profitable use of their property. As previously discussed, the majority of retail service stations are now operated by dealers and not employees. Thus the Act will have less impact, for example, than the zoning provisions upheld in *Goldblatt v. Hempstead, supra,* or *Baltimore City v. Borinsky, supra,* which deprived the owners of the most profitable use of the property. The relatively few service stations directly operated by producers and refiners may continue to be used as service stations, as producers and refiners may lease the property to dealers. The Maryland Act does not prohibit an oil company from owning a retail service station or having the station operated as a retail outlet for that company's products. It merely requires that the station be operated by a retail dealer rather than by company employees.

Moreover, allowance for the temporary operation by refiners and producers, as well as reasonable exceptions to the divestiture dates, as provided by the Act in Paragraphs G and H, will also lessen the impact of the divestiture provisions on producers and refiners.

In sum, the restrictions imposed by the divestiture provisions of the Act on the manner in which oil companies may continue to use their property for retail service station purposes, *i.e.,* using retail dealers instead of employees, does not amount to a "taking" of

private property in violation of the federal or state constitutions.

(4) *Equal Protection*

The oil companies argue, and the trial court held, that the divestiture provisions of the Act constitute a denial of the equal protection of the laws in that they prohibit only producers and refiners of petroleum products from operating retail service stations while permitting "wholesalers, mass merchandisers, food retailers, and gasoline marketers" to operate retail service stations. It is claimed that the classification is arbitrary and without any rational basis.[8]

The proper standard of review when economic regulation is challenged as violating the Equal Protection Clause of the Fourteenth Amendment has been most recently discussed by the Supreme Court in *City of New Orleans v. Dukes*, ___ U.S. ___, 96 S. Ct. 2513, 2516-2517, 49 L. Ed. 2d 511 (1976):

> "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require

[8] The oil companies, both at trial and on appeal, contend that the Act deprives them of the equal protection of the laws in violation of both the Fourteenth Amendment to the United States Constitution and the Due Process Clause, Art. 23, of the Maryland Declaration of Rights. The Maryland Constitution does not contain an express equal protection clause as does the Fourteenth Amendment. The trial court's equal protection holding was apparently premised upon the Due Process Clause of the Maryland Declaration of Rights. For the purposes of appeal, we shall assume that the Due Process Clause, Art. 23, embodies the concept of equal protection. Bruce v. Dir., Chesapeake Bay Aff., 261 Md. 585, 600, 276 A.2d 200 (1971); Celanese Corporation v. Davis, 186 Md. 463, 471-472, 47 A.2d 379 (1946). *Cf.* Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954). We shall further assume that the standard of review under both the Maryland Constitution and the Equal Protection Clause of the Fourteenth Amendment is the same where economic regulation is challenged on equal protection grounds.



> only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, *e.g., Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S. Ct. 405, 407, 96 L. Ed. 469 (1952), in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment."

If the classification is not purely arbitrary and has a rational basis, the statute does not violate the Equal Protection Clause. *McGowan v. State of Maryland*, 366 U.S. 420, 425-428, 81 S. Ct. 1101, 1104-1106, 6 L. Ed. 2d 393 (1961); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S. Ct. 337, 51 L. Ed. 369 (1911); *Bowie Inn v. City of Bowie, supra*, 274 Md. at 240-241; *Adm'r, Motor Veh. Adm. v. Vogt*, 267 Md. 660, 670-678, 229 A.2d 1 (1973); *Brooks v. State Board, supra*, 233 Md. at 114-115. Moreover, a statutory classification will not be held to violate the equal protection clause if there exists any state of facts which reasonably can be conceived to sustain it. *Davidson v. Miller*, 276 Md. 54, 69-70, 344 A.2d 422 (1975); *Matter of Trader*, 272 Md. 364, 391-392, 325 A.2d 398 (1974).

The statutory distinction between producers and refiners on the one hand, and other sellers of petroleum products on the other, is not arbitrary. As discussed previously, the Legislature determined that prohibiting producers and refiners from operating retail service stations was necessary to preserve competition. Furthermore, the Legislature may well have determined that discrimination against retail service station dealers and in favor of company operated stations, in the distribution of petroleum products, was an evil which could be

cured by preventing producers and refiners from operating retail service stations. Thus, the classification bears a rational relationship to the objective of the Act of preserving competition and fairness within the Maryland retail gasoline marketing industry. Consequently, there is no merit to the oil companies' argument that the Act denies them the equal protection of the laws.

(5) *Unlawful Delegation*

The contention that Paragraphs G and H of the Act constitute an unlawful delegation of legislative authority in violation of Art. 8 of the Maryland Declaration of Rights is also without merit. Ordinarily when legislative authority is delegated to administrative officials, there must be sufficient standards for the guidance of the administrative officials. However, it has been recognized that the complexity of modern economic conditions may make it impossible to tailor specific guidelines for every conceivable situation and that latitude in granting discretion is necessary. As stated in *Pressman v. Barnes*, 209 Md. 544, 555, 121 A.2d 816 (1956):

> "It is recognized that it would not always be possible for Legislature or City Council to deal directly with the multitude of details in the complex situations upon which it operates. . . . The modern tendency of the courts is toward greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increases."

*See also Montgomery County v. Walsh*, 274 Md. 502, 523-524, 336 A.2d 97 (1975), *appeal dismissed*, 424 U.S. 901, 96 S. Ct. 1091, 47 L. Ed. 2d 306 (1976). It would obviously be impractical for the Legislature to set specific guidelines to govern all situations where exceptions to the divestiture dates would be reasonable or where it would be necessary for a producer or refiner to operate a service station on a temporary basis. This



grant of authority to the Comptroller is necessary and is constitutional.

(6) *Conflict with the Federal Emergency Petroleum Allocation Act*

The trial court held that Paragraph F of the Maryland Act conflicts with and is therefore preempted by the Federal Emergency Petroleum Allocation Act of 1973.

Paragraph F of the Act provides that during periods of shortages, producers, refiners and wholesalers shall "apportion uniformly" gasoline and special fuels (which, as defined in Art. 56, § 157A(2), includes diesel oils) to all retail service station dealers "on an equitable basis" and "shall not discriminate among the dealers in their allotments." In view of the history of the Act, it is clear that the Legislature by this provision intended to prevent the inequitable distribution of petroleum products, reflected by the Comptroller's study, which occurred during periods when a particular supplier had insufficient supplies to satisfy its dealers' requirements. To prevent a supplier from favoring one dealer over another during a period when the supplier was experiencing a shortage, the Act requires that the available product be alloted to each dealer on the same basis. In other words, when supplies are insufficient to meet dealer requirements, there must be a pro rata reduction to each dealer.

In its fundamental purpose, Paragraph F of the Maryland Act is in harmony with the Emergency Petroleum Allocation Act, 15 U.S.C. 751 *et seq*. The federal act provides for the promulgation of regulations for the allocation of, *inter alia*, refined petroleum products. 15 U.S.C. 753. The federal act goes on to state that the regulations, to the "maximum extent practicable," shall provide for the "equitable distribution of . . . refined petroleum products . . . among all . . . sectors of the petroleum industry, including . . . non branded independent marketers, [and] branded independent marketers . . . ." 15 U.S.C. 753(b)(1)(F). To achieve this

objective of equitable distribution, the federal act further states that regulations should provide, where practicable, for a pro rata reduction in allocation to each branded and unbranded independent marketer where there is insufficient product to supply each with the amounts supplied in a prior corresponding base period. 15 U.S.C. 753(c)(1)(A). As originally enacted, the President's authority to promulgate regulations was to terminate on February 28, 1975. This authority has been extended several times, and has been extended most recently to September 30, 1981, by Pub. L. No. 94-163, § 461 (1975).

By its express terms, the federal Emergency Petroleum Allocation Act preempts only such state regulations of allocation of refined petroleum products which are in actual conflict with regulations promulgated pursuant to it. Thus, 15 U.S.C. 755(b) provides that:

> "The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order."

Therefore we need not determine whether the existence of a comprehensive system of federal regulation necessarily precludes state regulation, as Congress has specifically limited the type of state regulation which is preempted. We need only determine whether Paragraph F of the Maryland statute conflicts with any regulation promulgated pursuant to the Emergency Petroleum Allocation Act.

The federal regulations promulgated pursuant to the federal act establish a scheme of equitable petroleum allocation. Each supplier must determine its "allocation fraction" which is "equal to its allocable supply . . . divided by its supply obligation . . . ." 10 C.F.R. § 211.10(b). This fraction is then applied to each purchaser's "base period volume" to determine the



purchaser's allocation. In other words, each purchaser is allocated petroleum products based upon the seller's total supplies relative to the seller's total obligations. Where the allocation fraction is less than one, that is, where a supplier's allocable supply is less than his supply obligation for a base period, the supplier must reduce on a *pro rata basis* the amounts sold to purchasers. 10 C.F.R. § 211.10(f). This scheme is applicable to the allocation of motor gasoline, 10 C.F.R. § 211.107(b), as well as diesel fuel, 10 C.F.R. § 211.126(b), and as discussed above, is entirely consistent with Paragraph F of the state Act.

The Maryland Act requires that gasoline and special fuels be apportioned "uniformly," on "an equitable basis" to all retail service station dealers during a period of shortage.

The oil companies in arguing that Paragraph F of the Maryland statute is in conflict with the federal regulatory scheme, point to several factors affecting allocations under the federal regulations which may allow allocation on other than a "uniform" basis which they contend is required by Paragraph F. *See, e.g.*, 10 C.F.R. § 211.14(b), permitting a 5% reduction in monthly allocable supply to an area within a state to meet regional imbalances. We do not believe that the Legislature, in requiring that petroleum products be apportioned "uniformly," intended that the Comptroller could not take into account, as do the federal regulations, other factors affecting allocation and distribution of petroleum products which might result in varying allocations to certain dealers. Although petroleum products are to be apportioned "uniformly," allocation is also to be on an "equitable basis." By thus modifying "uniformly," it would appear that the Legislature contemplated that certain equitable factors might require variations in an otherwise uniform scheme of gasoline and special fuel allocation.

Consequently, we do not find that Paragraph F of the Maryland statute inherently conflicts with any regulation pursuant to the Emergency Petroleum Allocation

Act of 1973. We find that Paragraph F is in harmony with the Emergency Petroleum Allocation Act which expressly preserves the power of the states to regulate the allocation of refined petroleum products. As the State concedes, the Comptroller may not order allocation of petroleum products in conflict with the federal regulations enacted pursuant to the Emergency Petroleum Allocation Act or promulgate regulations pursuant to Art. 56, § 157B(a) which would conflict with present or future federal regulations. *Cf. Rice v. Board of Trade of City of Chicago*, 331 U.S. 247, 67 S. Ct. 1160, 91 L. Ed. 1468 (1947). However, enforcement of the provisions in accordance with federal standards would be proper.

(7) *Conflict with the Robinson-Patman Act*

Before the trial in this case commenced, the circuit court granted a motion for partial summary judgment filed by Exxon, Shell and Gulf regarding Paragraph D of the Maryland Act which requires that suppliers extend "voluntary allowances" uniformly to all retail service station dealers supplied. The trial court held that Paragraph D is in conflict with § 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13, and is therefore invalid under the Supremacy Clause, Art. VI of the United States Constitution.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), provides in part that "[i]t shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . ." However, § 2(b) of the same Act, 15 U.S.C. 13(b), provides a seller with a defense to a charge of price discrimination "by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . . ." The oil companies contend, and the court below held, that in requiring that voluntary allowances be extended to all retail service stations



within the state, the state Act deprives sellers of a federal right to discriminate in price between purchasers where necessary to meet an equally low price of a competitor as provided by § 2(b) of the federal act.

In determining whether a conflict exists between Paragraph D of Ch. 854 and § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, it is necessary both to determine the meaning of "voluntary allowances" as used in Paragraph D of the state statute and to ascertain the scope of the "meeting competition" defense in § 2(b) of the federal statute.

Turning to the meaning of "voluntary allowances" in Paragraph D, where a term used in a statute relating to a particular trade or industry does not have a common usage, then the term is presumed to be used in the commercial sense. As was said in *Armco Steel v. State Tax Comm.*, 221 Md. 33, 41-42, 155 A.2d 678 (1959):

> "When terms in a statute are used relating to trade or commerce, absent legislative intent to the contrary, the terms are presumed to be used in their trade or commercial meaning. 2 Sutherland, *Statutory Construction*, § 4919 (3d ed. 1943). . . . [I]t must be presumed that [the Legislature] possessed at least the common knowledge about that industry."

*See also Perdue v. St. Dep't of Assess. & T.*, 264 Md. 228, 234-235, 286 A.2d 165 (1972).

The State asserts that a " 'voluntary allowance' is oil industry jargon for a rebate of a portion of the otherwise uniform 'tank wagon (wholesale) price' paid by all dealers of a particular brand for their gasoline." (Appellants' brief, p. 40.) The Comptroller's report also defined voluntary allowances as discounts extended by suppliers to certain dealers to enable those dealers to meet competition. The oil companies do not disagree with the State's definition of "voluntary allowances."[9]

[9] The oil companies, however, do contend that the term "voluntary allowances" is unconstitutionally vague in that it may refer to other types of assistance extended to dealers such as rent relief in certain situations. For the reasons to be

In fact, affidavits filed by the oil companies in support of the motion for partial summary judgment, as well as stipulations of facts, support the State's position. Thus, an affidavit filed by a Shell marketing manager states:

> "Under specified market conditions, Shell grants temporary price reductions, or 'competitive allowances,' to its branded retail dealers. Shell's purpose in granting competitive allowances is to provide competitive and equitable assistance in gasoline prices to Shell dealers who are injured by local competitive gasoline price reductions of competing retailers which are subsidized by their suppliers."

To similar effect are affidavits filed by Exxon and Gulf.

This definition of "voluntary allowances" is supported by congressional reports dealing with the retail marketing of gasoline. The practice of granting temporary price reductions in the wholesale price to selected dealers to "meet competition" has long been in use and has been criticized in congressional reports as a means of controlling price competition in small, localized areas. In hearings before the Senate Select Committee on Small Business investigating a gasoline price war, one major oil company official described "voluntary allowances" as

> "a method of extending price assistance to an individual dealer to assist him in meeting price competition with which he is faced, to aid him in maintaining volume, and to help him, as an independent businessman, stay in business and protect his investment. *At the same time, because of its application to dealers on an individual basis, the plan tends to help localize the price disturbance.*" S. Rep. No. 2810, 84th Cong., 2d Sess. 19 (1956). (Emphasis supplied).

*See also* H.R. Rep. No. 1423, 84th Cong., 1st Sess. 12-17 (1955). There, as here, the practice of granting voluntary allowances to dealers to enable those dealers to

discussed below, we do not find that "voluntary allowances" as used in Paragraph D encompasses such a broad spectrum of dealer assistance and is limited to certain price discounts.



meet the price competition of other dealers was justified by the oil companies as being permissible price discrimination within the § 2(b) defense. S. Rep. No. 2810, 84th Cong., 2d Sess. 20.

Finally, in addition to the statements of the parties and the congressional reports, the legislative history of the Maryland statute confirms that the term "voluntary allowances" as used in Paragraph D refers to the pricing practices described by the oil companies. The Comptroller's report refers to the practice of temporary, selective price reductions, and indicates that the amount of these reductions varied considerably. The statement of an oil company executive at the hearings conducted by the Senate Economic Affairs Committee and the House Economic Matters Committee on the Act denies that price assistance is not offered on an equitable basis and takes the position that selective, localized price reductions are necessary and beneficial to dealers. Consequently, it appears that Paragraph D was intended to prevent the practice of localized price discounts, the Legislature believing that all retail service station dealers of the same brand should be treated equally. This is consistent with other provisions of the Act which are intended to eliminate discrimination against retail dealers by their suppliers.

Therefore, in view of the principle of statutory construction that terms relating to a particular industry are presumed to be used in their commercial sense in the absence of any common meaning to the contrary, and in light of industry practices and legislative history, we construe "voluntary allowances" to mean temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer.

The oil companies do not argue that Paragraph D is in general conflict with the Robinson-Patman Act. Rather their contention is based solely upon the availability of the § 2(b) defense where temporary price reductions are granted to a dealer to enable the dealer to meet the competition of another dealer. Such

competition at the retail level would occur basically in two situations. Either a competing retail dealer would lower its price on its own or a competing retailer would lower its price after receiving a reduction in the wholesale price from its supplier. We must determine, then, whether the § 2(b) defense would be available if a voluntary allowance were granted to a retail dealer to meet either one of these competitive situations.

It is settled that the § 2(b) defense is not available to a supplier where a discriminatory price cut is granted to a dealer to enable that dealer to respond to a competing dealer's price cut where the competing dealer does not receive a price cut from its supplier. In *Federal Trade Comm'n v. Sun Oil Co., supra,* 371 U.S. at 505, 83 S. Ct. at 358, Sun Oil Company granted a discriminatory price reduction to one of its retail dealers to enable that dealer to meet the lower price of a retail competitor. There was no showing that the lower price of the retail competitor was supported by an enabling price cut from its own supplier, and therefore the Court assumed that the retail competitor was unaided by its supplier. The Court held that the § 2(b) "good faith meeting competition" defense was not available to the supplier, as that defense applies only where the seller's reduction in price is made to meet "the lower price of his own competitor" and not the lower price of his customer's competitor. 371 U.S. at 529.

However, the Supreme Court in *Federal Trade Comm'n v. Sun Oil Co., supra,* 371 U.S. at 512 n. 7, 83 S. Ct. at 363 n. 7, specifically reserved the question of whether the § 2(b) defense is available if the seller's discriminatory price cut to its dealer is in response to a price cut made by a competitor of the seller to the competitor's dealer. There is a conflict in the lower federal courts on this question. In *Enterprise Industries v. Texas Company,* 136 F. Supp. 420, 421 (D. Conn. 1955), *reversed on other grounds,* 240 F. 2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965, 77 S. Ct. 1049, 1 L. Ed. 2d 914 (1957), the court held that the § 2(b) defense is available to a supplier only where the discriminatory price is



offered to a buyer in response to an equally low price offered *to that same buyer* by a competitor of the supplier. In other words, the § 2(b) defense is available only where the discriminatory price reduction is offered to retain a customer in the face of a "price raid" on that customer by a competitor of the seller. In *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana),* 466 F.2d 1163, 1175 (7th Cir. 1972), on the other hand, the court held that the defense is available if the supplier's lower price is offered to its dealer to meet the equally low price offered by a competitor of the supplier to its dealer. The court relied on the Federal Trade Commission's most recent interpretation of § 2(b) as announced in the Commission's *Report on Anti-Competitive Practices in the Marketing of Gasoline,* 3 Trade Reg. Rep., ¶ 10,373 at 18,245 (1967), where the Commission reversed its position on § 2(b) and abandoned its support of the *Enterprise* holding on which it had relied in *Federal Trade Comm'n v. Sun Oil Co., supra. See* Note, *Gasoline Marketing and the Robinson-Patman Act,* 82 Yale L. J. 1706, 1713 n. 44 (1973).

Although the question is not without doubt, based upon the limited nature of the § 2(b) defense and the purposes of the Robinson-Patman Act as discussed in *Federal Trade Comm'n v. Sun Oil Co., supra,* and *Standard Oil Co. v. Trade Comm'n,* 340 U.S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951), we agree with the interpretation of § 2(b) set forth in *Enterprise Industries v. Texas Company, supra.* As the Court observed in *Federal Trade Comm'n v. Sun Oil Co., supra,* the purpose of the Robinson-Patman Act was "to obviate price discrimination practices threatening independent merchants and businessmen . . . 371 U.S. at 520, 83 S. Ct. at 367. To accomplish this goal, the Robinson-Patman Act amended the Clayton Act to limit the § 2(b) defense to only those situations where the discriminatory price was offered "to meet an equally low price of a competitor." Prior to the Robinson-Patman Act, a defense was available where the discriminatory price concession "was made in good faith to meet competi-

tion." The House Committee in its report on the Act, said of this revision (H. R. Rep. No. 2287, 74 Cong., 2d Sess. 16 (1936)):

> "This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices *until his competition has first offered lower prices,* and then he can go no further than to meet those prices. If he goes further, he must do so likewise with all his other customers, or make himself liable to all of the penalties of the act, including treble damages. In other words, the proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further." (Emphasis supplied.)

This, in combination with the qualified wording of the § 2(b) defense when compared with the more expansive prohibition against price discrimination contained in § 2(a), led the Supreme Court to conclude that the defense was available only where the grantor of the discriminatory price was responding to price competition at his own level and not that at the level of the buyer who receives the discriminatory price. 371 U.S. at 514-515, 83 S. Ct. at 364-365.

Although the Court in *Sun Oil Company* did not decide if the § 2(b) defense is available only where two sellers are competing for the same customer, it did observe that this is the "more normal circumstance" where the § 2(b) defense is applicable. 371 U.S. at 526. *See, e.g., Krieger v. Texaco, Inc.,* 373 F. Supp. 108 (W.D. N.Y. 1973). The purpose of the § 2(b) defense was discussed in these terms in *Standard Oil Co. v. Trade Comm'n, supra,* 340 U.S. at 249-250, where the Court stated that the § 2(b) defense is available to a seller to prevent a "price raid" by permitting a seller "to retain a customer by realistically meeting in good faith the price



offered to that customer, without necessarily changing the seller's price to its other customers." To expand the § 2(b) defense beyond this situation, allowing a supplier selectively to reduce its price to a dealer where that dealer faces competitive pressures from another retail dealer aided by lawful reductions from its supplier, would frustrate the overall purpose of antitrust laws to promote competition. Selective price discounts allow sellers to suppress competition, especially from independent, non-branded dealers, in a relatively small area without offering lower prices on a more generalized basis. The use of voluntary allowances to enable petroleum suppliers to inhibit rather than foster competition has been recognized in studies on the retail marketing industry. H. R. Rep. No. 1423, 84th Cong., 1st Sess. 12017; S. Rep. No. 2810, 84th Cong., 2d Sess. 19023. As the Supreme Court said in *Federal Trade Comm'n v. Sun Oil Co., supra,* 371 U.S. at 523, 83 S. Ct. at 369, "[s]o long as the wholesaler can meet challenges to his pricing structure by wholly local and individualized responses, it has no incentive to alter its overall pricing policy."[10] Commentators have also concluded that to expand the § 2(b) defense to permit petroleum suppliers to extend localized, discriminatory price cuts to a retail dealer to enable that dealer to meet the lower price of a competing retail dealer, which is subsidized by a price cut by the supplier's competitor, would be inconsistent with the purpose and legislative history of the Robinson-Patman Act. Note, *Gasoline Marketing and the Robinson-Patman Act, supra; The Supreme Court, 1962 Term,* 77 Harv. L. Rev. 81, 173-176 (1963).

Consequently, we believe that the § 2(b) defense is available only where the discriminatory price reduction is to meet the equally low price offered to *the same*

[10] As the Court suggested in Federal Trade Comm'n v. Sun Oil Co., *supra,* 371 U.S. at 526, 83 S. Ct. at 370, sellers may, as an alternative to selective, discriminatory price cuts, reduce wholesale prices over a wider competitive area "so as to preclude the probable incidence of the substantial anticompetitive effects upon which [a] violation of § 2(a) is . . . grounded."

*buyer* by a competing seller. The oil companies, by relying on *Cadigan v. Texaco, Inc.*, 492 F.2d 383 (9th Cir. 1974), seem to suggest that even in this situation, where a discriminatory price reduction is offered to a dealer to meet an equally low price offered to that same dealer by a competing supplier, Paragraph D of the Maryland Act would require that the discount be offered to all retail service station dealers supplied. However, we have construed "voluntary allowances" in the state Act to mean only those price reductions offered to retail dealers to enable the dealer to meet the lower price of a *competing retail dealer*. Thus, there is no conflict between Paragraph D and § 2(b) of the Clayton Act as amended by the Robinson-Patman Act. Paragraph D of the state Act encompasses only the situation where temporary price reductions are given to a dealer to meet the lower price of a *competing dealer*, and, in our view, § 2(b) of the federal Act does not extend to that situation.

Moreover, even if the Legislature were to extend the concept of "voluntary allowances" to include the situation where a price reduction is offered to a retail dealer to meet the equally low price offered to that *same dealer* by a competing supplier, there has been no suggestion that such a situation occurs with any frequency in the oil industry. Consequently, in most situations where temporary price reductions are extended, there would be no conflict between the Maryland statute and the federal statute. If, however, a conflict did arise, the Maryland statute would be preempted only to the extent necessary to avoid the conflict and not in its entirety as the oil companies suggest. *DeCanas v. Bica*, 424 U.S. 351, 96 S. Ct. 933, 937 n. 5, 47 L. Ed. 2d 43 (1976); *Kewanee Oil Company v. Bicron Corp.*, 416 U.S. 470, 491-492, 94 S. Ct. 1879, 1891, 40 L. Ed. 2d 315 (1974); *State v. Texaco, Inc.*, 14 Wis. 2d 625, 111 N.W.2d 918, 923 (1961) (concurring opinion).



As previously indicated, the contention of the oil companies on appeal that Paragraph D is in conflict with the Robinson-Patman Act is premised solely upon the availability of the § 2(b) defense where voluntary allowances are granted. Nevertheless, the trial court in its opinion had also found that Paragraph D would obstruct the accomplishment and execution of the purposes of the Robinson-Patman Act. Where a state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress,' " it is void under the Supremacy Clause, *Kewanee Oil Company v. Bicron Corp., supra,* 416 U.S. at 479, 94 S. Ct. at 1885, quoting *Hines v. Davidowitz,* 312 U.S. 52, 61 S. Ct. 299, 85 L. Ed. 851 (1941). However, the objectives of both laws must be examined, *Kewanee Oil Company v. Bicron Corp., supra,* 416 U.S. at 480, 94 S. Ct. at 1885, and, where possible, the operation of both should be reconciled so as to avoid preemption, *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* 414 U.S. 117, 127, 94 S. Ct. 383, 389-390, 38 L. Ed. 2d 348 (1973). But it is not necessary to attempt to reconcile Paragraph D and the Robinson-Patman Act as the purpose and objectives of both are the same. The purpose of the Robinson-Patman Act was " 'the preservation of equality of opportunity' " by assuring "that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." *Federal Trade Comm'n v. Sun Oil Co., supra,* 371 U.S. at 520, 83 S. Ct. at 367. This is precisely the purpose of Paragraph D: to insure that all retail service station dealers are afforded equal treatment and to prevent discrimination among dealers of the same supplier. Therefore, Paragraph D is not an obstacle to the accomplishment of the same objective.

Consequently, we hold that Paragraph D of the Maryland Act is not invalid under the Supremacy Clause of the United States Constitution.

(8) *Void for Vagueness*

The oil companies contend that several terms in the Act, which imposes criminal sanctions for violations,

are so vague as to constitute a denial of due process of law in violation of Art. 23 of the Maryland Declaration of Rights and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The terms which are allegedly vague are: "producer or refiner"; "voluntary allowances" and "uniformly" as used in Paragraph D; "equipment rentals" and "uniformly" as used in Paragraph E; and "periods of shortage" and "uniformly . . . on an equitable basis" as used in Paragraph F.

The standard for determining whether a criminal statute is void for vagueness was set forth in *United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989 (1954):

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

*Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926); *Bowie Inn v. City of Bowie, supra*, 274 Md. at 239-240; *Giant of Md. v. State's Attorney*, 267 Md. 501, 514-515, 298 A.2d 427, *appeal dismissed*, 412 U.S. 915, 93 S. Ct. 2733, 37 L. Ed. 2d 141 (1973). Where a statute regulates commercial activity, the standard of ordinary intelligence is one of "ordinary commercial knowledge." In other words, the statute must be sufficiently definite so as to inform one possessing "ordinary commercial knowledge" of what conduct is prohibited. *McGowan v. State of Maryland, supra*, 366 U.S. at 428, 81 S. Ct. at 1106 (holding that an exception to the Maryland Sunday closing laws permitting the retail sale of " 'merchandise essential to, or customarily sold at, or incidental to, the operation of bathing beaches, amusement parks et cetera" was not unconstitutionally vague); *Potomac Sand & Gravel v. Governor, supra*, 266 Md. at 379 (holding that a statute prohibiting the dredging of sand or gravel in "marshlands" was not unconstitutionally vague). Where necessary, the constitutional requirement of definiteness may be satisfied by a reasonable construction of the statute by the courts. *United States v. Harriss, supra*, 347 U.S. at 618, 74 S. Ct. at 812; *Potomac Sand & Gravel v. Governor, supra*, 266 Md. at 379.



Most of the allegedly vague provisions of the Act, such as "voluntary allowances uniformly," as used in Paragraph D, and "periods of shortage," "uniformly" and "on an equitable basis" as used in Paragraph F, have already been discussed. These provisions are, in our view, sufficiently definite so as not to constitute a denial of due process of law. Likewise, we find, as did the trial court, that the term "producer or refiner" is not unconstitutionally vague. A producer, as used in the Act, is a person, firm or corporation engaged in the production of crude oil, *i.e.*, extracting crude oil from the earth. A refiner is one engaged in refining crude oil.

Nor do we find that Paragraph E, which requires that all equipment rentals be applied uniformly to all retail service station dealers supplied, is unconstitutionally vague. Affidavits filed by the oil companies indicated that certain equipment supplied to retail service station dealers is customarily included in the lease of the station. However, certain other items such as "identification signs and credit card imprinters" are not included in the lease but are rented separately to each dealer. We think that the term "equipment rentals" refers to that equipment which, according to industry practice, is supplied to the dealer separate from the lease of the service station. And consistent with the policy of the Maryland Act that all retail service station dealers be treated equally by their supplier, Paragraph E mandates that all dealers be charged the same rental for like equipment.

(9) *Severability*

The oil companies' final argument is that the various provisions of Ch. 854 are not severable. Recognizing that their substantive due process, commerce clause,

unconstitutional taking and equal protection arguments are directed solely at the Act's divestiture provisions (Paragraphs B and C), whereas Paragraphs D and F are challenged only on Supremacy Clause grounds, the oil companies contend that if any of these challenges is accepted by this Court, then the entire Act should be held invalid. (Appellees' brief, p. 66). They maintain that the Legislature intended the Act to be "an integrated whole." (*Ibid.*) With respect to the issue of severability, *see* Maryland Code (1957, 1976 Repl. Vol.), Art. 1, § 23; *Blackwell v. State*, 278 Md. 466, 473-474, 365 A.2d 545 (1976); *Shell Oil Co. v. Supervisor*, 276 Md. 36, 48-49, 343 A.2d 521 (1975), and cases therein cited. However, since we have rejected all of the challenges to the Act's provisions made by the oil companies in this Court, the issue of severability is not now presented for decision.

*Judgment of the Circuit Court for Anne Arundel County reversed, and case remanded to that court for entry of a judgment in accordance with this opinion.*

*Appellees to pay costs.*



## APPENDIX B

*In the Court of Appeals of Maryland*

*No. 10*

*September Term, 1976*

*Governor of the State of Maryland, et al.*
*v.*
*Exxon Corporation, et al.*

*On Motions for Reconsideration and Stay of Mandate*

Before Murphy, C.J., and Smith, Digges, Levine and Eldridge, J.J., and James C. Morton, Jr., and Ridgely P. Melvin, Jr., Associate Judges of the Court of Special Appeals, specially assigned.

Decided April 13, 1977

ELDRIDGE, J.:

Appellees have all filed motions for reconsideration. In all respects but one, the points raised have been adequately answered by this Court's opinion, and to this extent the motions are denied.

The one matter raised which is not dealt with in the Court's opinion involves a question of statutory

interpretation. In their motion for reconsideration Commonwealth Oil Refining Company, Inc., and Petroleum Marketing Corporation (PMC) have requested that the mandate of this Court be modified to allow the court below on remand to consider their argument that the Maryland Act is not applicable to PMC. In its declaration, PMC alleged that the term "retail service station" as used in Paragraphs B and C of the Act refers only to retail service stations offering a "full line of automotive services to the motoring public" and that, therefore, those provisions are not applicable to PMC which operates "gas only" service stations. The trial court did not rule on this issue, and since this question was not raised on appeal, this Court did not consider it. However, as this contention involves only a legal issue of statutory interpretation, we shall now consider it instead of remanding for further trial court proceedings. *See* Maryland Rule 885.

Definitions applicable to the entire Motor Fuel Inspection Law, Maryland Code (1957, 1972 Repl. Vol., 1976 Cum. Supp.), Art. 56, §§ 157A-157M, of which the challenged statute is a part, are found in Art. 56, § 157A. Section 157A(6) defines "retail service station dealer" as "any person, firm or corporation maintaining a place of business where motor vehicle fuel is sold and delivered into the tanks of motor vehicles." In view of this definition of "*retail service station* dealer," it is clear that "retail service station" refers to any retail place of business where motor vehicle fuel is sold and delivered into the tanks of motor vehicles. The term is not limited to those places which, in addition to selling motor vehicle fuel, also offer automotive services. Moreover, the purpose of Paragraphs B and C is to preserve competition in the retail gasoline market by eliminating what the Legislature determined to be the destructive competition of service stations operated directly by producers or refiners. To so limit the definition of "retail service station" would defeat the purpose of these provisions by allowing producers or refiners to continue to operate retail service stations so



long as those stations did not offer automotive services. Such an interpretation of the statute was clearly not intended by the Legislature. Therefore, we hold that "retail service station" as used in Paragraphs B and C includes stations such as those operated by PMC which sell only motor vehicle fuel.

The appellees have also filed a motion to stay the mandate of this Court. If the mandate were to be issued, the circuit court would be required to dissolve the injunction prohibiting appellants from enforcing the Act. Appellees contend that dissolution of the injunction would require immediate enforcement of the divestiture provisions of the Act by the State prior to possible review and final disposition of this case by the Supreme Court of the United States and would result in irreparable injury. We do not agree that upon dissolution of the injunction, the State will be either permitted or required to enforce the divestiture provisions immediately.

The Act became effective on July 1, 1974. Under Paragraph B, after that date no producer or refiner was to *open* a retail service station operated by company personnel. However, under Paragraph C, producers or refiners were not prohibited from operating retail service stations with company personnel until after July 1, 1975. Thus, the General Assembly provided a one year period from the effective date of the Act in which producers or refiners could convert company operated stations to dealer operation or otherwise divest themselves of company operated stations. The statutory language reflects a clear legislative intent to delay enforcement of the divestiture provisions for one year after the Act becomes operative. The State, interpreting the statute in a like manner, has stated in its answer to the motion that the one year period will be observed in the enforcement of the Act in accordance with the requirements of the statute. Therefore, the divestiture provisions of Paragraph C cannot be enforced until one year from the dissolution of the injunction in the instant case. Consequently, issuance of our mandate

will not result in immediate enforcement of the divestiture provisions of the Act. It should also be noted that under Paragraph H of the Act, the Comptroller may permit reasonable exceptions to the divestiture dates in the event that there is no final resolution of this case prior to the one year divestiture period. Accordingly, we do not find that issuance of the mandate will result in irreparable injury to the parties. The motion for stay of mandate is denied.

*Motions Denied.*



## APPENDIX C

## MEMORANDUM

*In the Circuit Court for Anne Arundel County*

*Equity Nos. 22,069, 22,091, 22,216, 22,461, 22,502, 22,551 and 22,562*

*Exxon Corporation, et al.,*
*Plaintiffs,*

*v.*

*Marvin Mandel, Governor, et al.,*
*Defendants.*

Paragraph D of Chapter 854 of acts of 1974 provides: "Every producer, refiner or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied."

Plaintiffs have moved for partial summary judgment, claiming that the provisions of paragraph D are illegal.

Assuming without deciding that the term "voluntary allowances" includes a price reduction to selected dealers, the court believes that there are no substantial facts in dispute on the question of the legal effect of paragraph D, and consequently it is appropriate that the plaintiffs' motion for summary judgment be entertained by the court to the end that this trial be expedited as much as possible.

It is established and stipulated that Plaintiff movants are producers and refiners of petroleum products, and

offer goods and services at retail and wholesale levels in Maryland.

All gasoline and allied petroleum products sold by movants to dealers in Maryland is transported into the State in a continuous flow of interstate commerce from refineries located outside the boundaries of the State.

Under specified market conditions, movants have, and presently do grant temporary price reductions or competitive price allowances to their branded retail dealers within certain geographic areas in Maryland without extending such allowances on a state-wide basis.

Literal enforcement of paragraph D in matters of price allowances would place the plaintiffs in jeopardy of violation of the Robinson-Patman Act passed by the Congress of the United States in 1936 in an attempt to foster fair competition in interstate commerce. Particular exposure of risk would take place in areas where compliance with paragraph D would necessarily impinge upon gasoline sales in neighboring states or the District of Columbia.

Where, as in Maryland, gasoline is neither produced nor refined, it has been held that sales *in commerce* are effected when a dealer is sold gasoline which had been refined by the supplier in a state other than the one in which the sales were made. *Standard Oil Co. v. F.T.C.*, 340 U.S. 231; *Bargain Car Wash v. Standard Oil Co.*, 466 F.2d 1163. Moreover, paragraph D would have the effect of depriving the plaintiffs in Maryland of the absolute defense afforded them by sub-section 2(b) of 15 U.S. Code §§ 13-13B. 21a (1952) when plaintiffs are alleged to have discriminated in price between different purchasers of commodities of like grade and quality.

While it seems clear to the court that Robinson-Patman does not completely preempt the field of gasoline marketing within the several states of the United States, paragraph D of the Maryland Act would unquestionably have the effect of repealing the 2(b) defense in Maryland, and at the same time impose upon



the plaintiffs the risk of conflict with federal policy which has been held to be prohibited to the states as early as 1819 in *McCulloch v. Maryland*, 17 U.S. 316.

> "The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think the unavoidable consequence of that supremacy which the Constitution has declared." *McCulloch, supra.*

As late as June of 1975 in *Connell Const. Co. v. Plumbers and Steamfitters Local*, 43 Law Week 4657, the Supreme Court reiterated that federal law preempts state remedies that interfere with federal policy, especially where substantial risk of conflict exists.

This court finds that the risk of conflict in attempted compliance by the plaintiffs with paragraph D is all apparent, and that this paragraph, would of necessity, foster the lack of lawful competition within the State to the detriment of the consumer. It therefore finds that in obstructing the accomplishment and execution of the full purposes and objectives of an Act of Congress of the United States paragraph D is invalid under the preemption doctrine. *Hines v. Davidowitz*, 312 U.S. 52.

The Plaintiffs' motion for partial summary judgment is therefore granted this 14th day of October 1975.

E. MACKALL CHILDS,
Judge.

## APPENDIX D

## MEMORANDUM OF OPINION

*In the Circuit Court for Anne Arundel County*

*Equity Nos. 22,069, 22,091, 22,216, 22,461, 22,502, 22,551 and 22,562*

*Exxon Corporation, et al.,*
*Plaintiffs,*

*v.*

*Marvin Mandel, Governor, et al.,*
*Defendants.*

This litigation was commenced when Exxon Corporation ("Exxon") filed suit against defendants on June 17, 1974 alleging the unconstitutionality of Chapter 854 of the Laws of Maryland of 1974. Plaintiffs Continental Oil Company and Kayo Oil Company ("Kayo") and Shell Oil Company ("Shell") subsequently filed similar suits on June 28th and September 3rd, 1974, respectively. Plaintiffs Gulf Oil Corporation ("Gulf"), Phillips Petroleum Company ("Phillips"), Petroleum Marketing Corporation and Commonwealth Oil Refining Company, Inc. ("Petroleum Marketing") and Ashland Oil, Inc. ("Ashland") filed bills of complaint on January 23, 1975, February 14, 1975, March 19, 1975 and March 26, 1975, respectively. All of these suits are consolidated for purposes of the trial of this case.

On May 5, 1975 (on July 24, 1975 for Petroleum Marketing), the Court entered an order prohibiting defendants from enforcing against plaintiffs the provisions of Chapter 854 while the instant case is pending

and at the same time prohibiting plaintiffs, while the instant case is pending, from opening and operating service stations with company personnel, personnel of a subsidiary company or a commissioned agent without first notifying the defendants of their intention to do so.

Motions for partial summary judgment with respect to paragraphs D and F of Chapter 854 were filed by Shell and Exxon on May 29, 1975 and by Gulf on June 19, 1975. Thereafter, as a result of the deposition of John K. Coleman, Chief of the Gasoline Tax Division of the Comptroller's office, taken by plaintiffs on July 23, 1975, plaintiffs Continental, Shell, Gulf, Phillips and Ashland filed a joint motion for partial summary judgment as to paragraphs B and C of the statute on August 10, 1975.

After extensive briefing and argument on the motion in open court the undersigned granted the motion for partial summary judgment and ruled that paragraph of Chapter 854 unconstitutionally impinged upon the provisions of the Robinson-Patman Act and especially precluded plaintiffs from availing themselves with the absolute defense afforded under 2(b) of 15 U.S. Code §§ 13-13B, 21a (1952) in the events plaintiffs are alleged to have discriminated in price between different purchasers of commodities of like grade and quality.

Argument and decision as to paragraph F was deferred pending action by the United States Congress in terminating or extending the Federal Emergency Petroleum Allocation Act of 1973.

Plaintiffs continue to seek a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, § 157E of the Annotated Code of Maryland (as amended at the 1975 Session of the General Assembly by Chapter 608 of the Laws of Maryland of 1975 effective July 1, 1975) ("the Act"), is unconstitutional and invalid, and a permanent injunction prohibiting the defendants from enforcing the provisions of the Act against the plaintiffs. All plaintiffs, except Exxon and Petroleum Marketing, (by



their joint motion for partial summary judgment filed on August 10, 1975) seek a declaratory judgment that paragraphs B and C of the Act are not applicable to them or in the alternative are unconstitutionally vague.

The Maryland Act adds the following provisions to Article 56, § 157E (the italic portions are those added by Chapter 608):

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated* by a retail service station dealer.
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
>
> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.
>
> (F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an

equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

## THE PLAINTIFFS

(As Stipulated Among Counsel)

### EXXON

Exxon Company, U.S.A., a division of Exxon Corporation (hereinafter referred to as "Exxon") was formed effective January 1, 1973, and operates the business interests formerly operated by Humble Oil & Refining Company.

Exxon is a company involved in exploration for and production of crude oil and natural gas and in the refining, transporting and marketing, at both the wholesale and retail levels, of a wide range of petroleum products.

Insofar as petroleum products are concerned, operations by Exxon in Maryland are limited to distribution and marketing.

Exxon has no crude oil production or petroleum refineries in Maryland. Consequently, purchasers of Exxon branded gasoline in the State of Maryland have all of their gasoline supplied from outside the state.

Gasoline sold under the Exxon brand in the State of Maryland normally comes from Exxon's refineries at Baytown, Texas, and Baton Rouge, Louisiana. The crude oil refined at these two refineries comes from both domestic and foreign sources. Crude oil refined at Baytown normally comes from Texas, Alabama, Florida, and foreign sources. Crude oil refined at Baton Rouge normally comes from Texas, Louisiana, Mississippi, Alabama, Florida and foreign sources.



Gasoline produced at these two refineries is transported to two primary terminals which supply customers in Maryland. These primary terminals are located in Fairfax, Virginia and Baltimore, Maryland. The gasoline is normally brought to the Fairfax terminal by common carrier pipeline, the Plantation Pipeline System, from the Baton Rouge refinery. In 1973, approximately 118,500,000 gallons of gasoline were supplied to Maryland customers from this terminal. This terminal also supplies gasoline to customers in Virginia and Washington, D. C. The Baltimore terminal is normally supplied from the Baytown refinery by tanker. In 1973 approximately 210,000,000 gallons of gasoline were supplied to Maryland customers from this terminal. This terminal also supplies gasoline to customers in Pennsylvania, Virginia and West Virginia.

Exxon maintains one secondary terminal in Maryland, at Salisbury. The secondary terminals at Easton and Hagerstown have been closed since Exxon filed its Bill of Complaint. The Salisbury terminal is supplied by barge or tank truck from the Baltimore terminal. In addition, a terminal at Norfolk, Virginia has on occasion supplied Exxon brand gasoline for portions of the lower Chesapeake Bay area of Maryland. The Easton, Hagerstown, Salisbury, and Norfolk terminals accounted for approximately 29,000,000 additional gallons of gasoline to Maryland customers in 1973.

The majority of Exxon brand motor oil sold in Maryland comes from the Baytown and Baton Rouge refineries where the base stock is made. It is shipped by tanker to Bayonne, New Jersey, where it is blended into motor oil with additives, which are made at Bayonne. It is then barged to the Baltimore plant where it is canned and trucked to customers. The vast majority of greases sold in Maryland at Exxon company-operated stores and at various Exxon dealer service stations come from Exxon's plant in Pittsburgh, Pennsylvania.

Antifreeze, spark plugs, tires, batteries and accessories sold at company-operated stations and at various Exxon dealer stations in Maryland are manufactured by other companies at various places outside the State of Maryland and Shipped into Maryland by truck and rail.

Exxon operates four stations in Maryland selling gasoline under the Alert brand. These stations are supplied by refineries, other than those of Exxon, located outside the State of Maryland. Prior to June 4, 1974 the product was acquired primarily from Crown Petroleum Corporation. Since then, the Alert stations have been primarily supplied by BP Oil Corporation.

Exxon does not engage in any producing of motor vehicle fuels in the State of Maryland.

As of December 31, 1973 Exxon branded gasoline was sold at approximately 25,400 retail outlets located in forty-five states and the District of Columbia.

Exxon began marketing operations in Maryland in 1916. Exxon sells substantial quantities of gasoline and other petroleum products and other goods and services at the retail level both in local markets in Maryland and also to persons, such as interstate travelers, common carriers, airlines, and the shipping industry, operating exclusively in interstate commerce in Maryland.

As of July 1, 1974, Exxon had 36 company-operated stations in Maryland, representing approximately 6.7% of the 532 direct served[1] Exxon branded service stations in Maryland. This represents a decline from 57 company-operated stations in Maryland as of December 31, 1971 or approximately 9.2% of the 620 service

[1] Those service stations operated by independent dealers or by company personnel which receive their product directly from Exxon, as distinguished from those stations which are supplied by companies which purchased Exxon brand gasoline and resold it. The latter companies are generally known as resellers.



stations at that time.[2] As of December 31, 1973, Exxon had 356 stations operated by lessee dealers in Maryland. As of December 31, 1974, Exxon had 326 stations operated by lessee dealers in Maryland. At the end of 1973, Exxon had approximately 140 contract dealers in Maryland. At the end of 1974, Exxon had approximately 133 contract dealers in Maryland.

Exxon currently has 30 branded resellers in Maryland. It has no direct knowledge of the exact number of Exxon branded outlets through which the resellers sell their products or to the extent to which other products and services are offered by those facilities.

Exxon markets its products nationally and in Maryland through a full range of retail facilities. In Maryland, Exxon had 11 Car-Care Centers (one of which is combined with a car wash facility), one full self-service station, one turnpike station, and four limited service stations selling gasoline under the Alert brand. The remainder of the 532 direct served Exxon branded service stations in Maryland as of December 31, 1973 are conventional facilities.[3]

The Car Care Centers in Maryland have from 7 to 12 bays as compared with 2 to 4 bays of the typical conventional service station and the cost of investment is substantially higher. They are specifically equipped and manned for repair and maintenance work. Their service work capability usually includes alignment and front-end repairs, brake work, exhaust system work,

[2] Exxon has traditionally marketed its gasoline primarily through independent retailers and wholesalers rather than through company operations. As of December 31, 1973, Exxon operated with company personnel 933 service stations nationwide. These stations represent approximately 3.7% of the approximately 25,400 Exxon retail outlets. This represents a decline from the 2,731 company-operated service stations as of December 31, 1971 or 9.7% of the then approximately 28,100 Exxon retail outlets.

[3] As of July 1, 1974, Exxon had 123 major service centers nationwide which operate under the logo Exxon Car-Care Center and had 74 full self-service stations nationwide.

tune-up, shock absorber and universal joint replacement, airconditioning service and repair, cooling and heater system service and repair, fuel system work, ignition work, and power train-transmission service. In addition to these maintenance and repair services, the Car-Care Center provides the consumer with a full line of tires, batteries, and automobile accessories. The Car-Care Center concept was developed by Exxon to participate in the expanding market for automobile repair and services. The repair services provided at those Centers are guaranteed at any Car-Care Center in the nation, not just the one which issues the warranty.

The following is a list of specialized equipment found at a "Car Care Center":

1. Start-a-Car Unit.
2. Fuel pump tester.
3. Bearing press package-17 ton.
4. Wheel-puller package including drivers, etc.
5. Brake Shop-combination.
6. Acetylene gas welding unit.
7. ARC welding unit.
8. Custom wheel adapter kit to handle all cars.
9. Grand Prix adapter for ETC-10.
10. Wheel bearing packer.
11. Parts cleaner-air operated.
12. Power washer package complete.
13. Jacks-lifting package.
14. Screw type stand 64" to 83" height 500 lob. rating — used for lifting.
15. Brake stool.
16. Air filter tester.
17. PCV valve tester.
18. Compression tester.
19. Head gasket leak detector.
20. Mechanics stethoscope.



21. Inspection mirror.
22. Brake Analyzer-dynamic.
23. Static front end alignment.
24. Alignment lift.
25. Headlight tester.

**THE Chart in Appendix A identifies the initial investment by Exxon in all of Exxon's existing company-operated stations in Maryland based upon dollar values at the time of the original investment by Exxon, broken down according to land, building and equipment. The total investment amounts to** $10,059,700.00

**The following tables shows the volume of gasoline in thousands of gallons sold through Exxon branded stations in Maryland in 1973:**

| *Total*[4] | *Company Operated* | *% of Total* | *Non-Company Operated*[5] | *% of Total* |
|---|---|---|---|---|
| 344,921.9 | 54,190.0 | 15.7% | 290,731.9 | 94.3% |

**The following table shows the volume of motor oil, tires, and batteries sold through direct served Exxon brand stations in Maryland during 1973:**

| | *Total* | *Company Operated* | *% of Total* | *Non-Company Operated* | *% of Total* |
|---|---|---|---|---|---|
| Motor Oil (gallons) | 1,184,100 | 157,600 | 13.3% | 1,026,500 | 86.7% |
| Tires (units) | 85,891 | 11,831 | 13.8% | 74,060 | 86.2% |
| Batteries (units) | 27,850 | 4,378 | 15.7% | 23,472 | 84.3% |

[4] Includes 25,280,000 gallons sold by Exxon to resellers in Maryland in 1973.

[5] These figures reflect only wholesale sales by Exxon to non-company operated stations. The dealers at these stations purchase additional quantities of these products from other sources and sell them at retail.

In 1973 Exxon had retail sales at company-operated stations of $928,450 in house brand accessories, and $690,860 in other accessories and had labor revenue of $1,256,801. This is in comparison with wholesale sales by Exxon of house brand accessories to non-company operated stations of $1,110,905. Figures for other accessories and labor revenue at non-company-operated stations are not available to Exxon.

There is presently in force a contract between Exxon Corporation and the Maryland Transportation Authority dated November 15, 1973 for the operation of a gasoline service station at the turnpike facility at the Maryland House located on the John F. Kennedy Memorial Highway. The contract is for a period of five years with a right of renewal for an additional five years. The contract contains the following provisions, among others, concerning the operation of the facility:

a. Exxon agrees to operate the service station in a highly efficient manner, and to conduct its operations in accordance with the highest standards of management for service stations, to the end that the public may be served in the best possible manner and that public esteem may be won for Exxon, its service and products, and for John F. Kennedy Memorial Highway.

b. Prices charged for goods and services sold at the service station shall be no higher than, and the quality thereof shall be at least equal to, the prices and quality prevailing at service stations in the same general vicinity which are owned and operated by oil companies.

c. Exxon shall supply free service at least equal to such service supplied by service stations in the general vicinity which are owned and operated by oil companies.

d. Exxon is to operate the service station 24 hours a day every day of the week. Ample provision is to be made by Exxon for speedy and convenient handling of patronage during all hours.



e. Exxon shall have a sufficient number of trained and uniformed attendants on duty at all times to conduct properly the business of a gasoline service station. All employees of Exxon working on the premises must be thoroughly familiar with the location of interchanges in order to direct motorists intelligently, and they must know the emergency services, including doctors, hospitals, and ambulances, available in the general vicinity of the service area.

f. Exxon is to furnish roadside service for disabled vehicles, including two modern service trucks of good appearance and in first class mechanical condition available 24 hours a day on standby service. Exxon shall perform its duties in such manner as to furnish adequate call service to highway patrons within 20 minutes from the time Exxon is notified. The equipment operators must at all times be courteous and present a clean and neat appearance. They shall obey and respect all rules and regulations of the Authority. The Operator shall encourage each equipment operator to obtain a certificate of completion of the standard 22-hour Red Cross first-aid training course when and if practical and shall permit operators to attend such course during regular working hours without deduction from such operator's pay, when and if arrangements can be made for such training.

The following is a list of innovative marketing concepts of products testified at stations operated by Exxon in Maryland and elsewhere, with an explanation of each concept or product.

1. *Partial self service.* Several years ago Exxon tested self-service operation at one island in a number of company-operated stations in different markets. The experiment lasted for some two or three years. When, in Exxon's opinion, it was found to be successful and the techniques adequately developed, Exxon encouraged dealers to consider partial self-service where legal and suitable in order to enable them to compete for a broader spectrum of customers. Exxon made the program

available to dealers upon request at no cost. Exxon's cost was approximately $750 per station. Among the problems and issues dealt with during this experiment were the following: a) the type of equipment and collection system which is most convenient and acceptable to the motorist; b) the most effective means of communicating to the motorist as he enters the station that one island is self-service and the other is full service; c) special problems which arise in the operation; d) whether credit cards should be accepted at the self-service island; e) the number of customers who convert from full service to self-service. In Exxon's opinion the resolution of these kinds of issues could only be accurately obtained by close control of operating procedures and monitoring of the results, best performed at company-operated stations.

2. *Valucenter advertising and promotion.* The valucenter concept of cooperative advertising and sales promotion was tested at Car Care Centers and after, in Exxon's opinion, proving successful, was expanded to include dealers who wished to participate.

3. *Manning guidelines.* During the gasoline shortage in 1973, new manpower productivity guidelines were developed at direct operated stations and were passed on to dealers, as counseling guidelines, through the sales representatives. These guidelines would, in Exxon's opinion, assist a dealer in controlling his largest expense — manpower — during the time of shorter hours and fewer days and, at the same time, help to maximize customer convenience.

4. *Certification of mechanics.* The National Automotive Institute for Service Excellence (NAISE) and automobile manufacturers decided to certify mechanics through their organization as being competent for repairing automobiles. Initially, this program would have included only mechanics of automobile dealers. As a result of being in the Car-Care Center business, Exxon, with the help of the American Petroleum Institute, was able to get NAISE to expand the program to



include service station mechanics. Further, through the experience of its Car-Care Center mechanics taking the test of certification, Exxon was able to advise its dealers of the kinds of training needed prior to taking the tests and also was successful in getting the certification of mechanics by NAISE broken down into about eight categories of expertise rather than having only one category of Master Mechanic.

5. *Automotive exhaust emission.* As a result of operating Car-Care Centers, Exxon became interested in testing various manufacturers' equipment which is designed to test the exhaust emissions of automobiles. In Exxon's opinion some of the equipment was found to be reasonably acceptable Others were found to have problems. With the help of a research division of Exxon, the Company was able to develop reasonable equipment and procedures for testing exhaust emissions. Subsequently, the State of New Jersey required automobiles licensed in that state to be inspected and adjusted to a minimum level of exhaust emissions. As a result of Exxon's work in its company-operated stations, Exxon was able to qualify quickly all such stations in New Jersey and many of its dealers to the extent that they were licensed by the State of New Jersey to conduct these tests and make necessary adjustments to the customer's car. With about 15% of the service stations in New Jersey, Exxon had better than 50% of those licensed by the State to test exhaust emissions.

6. *In-bay car wash units.* A number of in-bay units were tested at company-operated stations. As a result Exxon was able to advise its dealers as to which pieces of equipment to avoid and which to use and at the same time developed a set of operating guidelines which were made available to dealers.

7. *Add-on air conditioners and tape decks.* Exxon tested the sale of these items at company-operated stores and found that, in Exxon's opinion, they were highly expensive items and that the

degree of expertise needed to actively compete with specialty stores in these items made them non-profitable. As a consequence, Exxon advised its dealers to avoid these items of merchandise.

8. *Exact cash or credit card after dark.* Due to the high incidence of robberies at service stations, the company tested a procedure of accepting only cash in the exact amount of the purchase or credit cards for sales made after dark. This program subsequently was offered to Exxon dealers, and the incidence of robberies at stations which adopted this practice has declined significantly.

9. *Automotive repair and diagnostic equipment.* The company tested various types of repair and diagnostic equipment at Car-Care Centers and planned to recommend types of equipment and procedures to its dealers. Automobile diagnosis at the time of this test was, in Exxon's opinion, a popular item in the marketplace. The dynamometer, a loaded mode diagnostic equipment device, was very expensive and difficult to utilize profitably. Consequently, the company dropped this kind of equipment at company-operated stores and did not recommend to its dealers to participate in this effort. Exxon has tested idle mode diagnostic equipment, and is currently preparing to test muffler diagnostic equipment. Various types of automotive repair equipment have also been tested at company-operated stations, including, for example, those for front-end alignment.

10. *Motor oil vending machines.* Motor oil vending machines were tested at full self-service company-operated service stations. The negative results from the test led Exxon to advise dealers not to invest in machine.

Exxon recognizes certain geographic areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such "trading areas" it does, in order to meet competition from other suppliers, temporarily reduce its wholesale price or grant temporary allowances to its



dealers or resellers without making price reductions or allowances throughout the State.

The normal business practice of Exxon is not to extend temporary allowances, price adjustments or rent relief "uniformly to all retail service station dealers supplied" either within the State of Maryland or nationwide.

Some of Exxon's trading areas cover geographic areas which cross the boundaries of the State of Maryland into adjoining jurisdictions, including, for example, the District of Columbia and West Virginia.

Exxon is not aware of any violations of law by Exxon in the use of any voluntary allowances in the State of Maryland.

It has on occasion granted to its lessee dealers in Maryland rental abatements or rental modifications for various reasons.

When Exxon leases a service station facility to a dealer, such Exxon owned equipment as pumps, tanks, lifts, lights and air compressors are included in the lease agreement and the lease rental. Other items of Exxon owned equipment, such as identification signs and credit card imprinters, are separately rented to the dealer.

An investigation was conducted on January 29 and 30, 1974 by auditors of the Gasoline Tax Division of the Comptroller's Office, Early W. Bates and Charles C. Downs, to determine whether the allocation of gasoline by Exxon to some 30 stations selected at random by the auditors was fair and equitable. These auditors conducted a subsequent investigation on February 19 and 20, 1974 to review the allocation to Exxon's company-operated stations. The conclusion reached by the auditors upon the completion of their investigations was that Exxon was allocating its supply to dealers properly vis-a-vis its company-operated stations.

## CONTINENTAL OIL COMPANY
## KAYO OIL COMPANY

The Continental Oil Company (hereinafter referred to as "Continental") is a Delaware corporation which was formed effective October 8, 1920. The duration of its charter is perpetual. The stock of Continental is publicly held and traded. Its principal offices are located in Houston, Texas, Stamford, Connecticut and Ponca City, Oklahoma.

It is a company involved in exploration for and production of crude oil and natural gas and in the refining, transportation of crude oil and natural gas and in the refining, transportation and marketing, at both the wholesale and retail levels, of a wide range of petroleum products.

Continental does not produce or refine petroleum products or motor vehicle fuels in Maryland, nor does it have any independent service station dealers in Maryland. It does not sell branded "Conoco" gasoline here.

The petroleum products which Continental brings into the State of Maryland are refined by it at its Westlake, Louisiana refinery. The petroleum products are then transported through the Colonial Pipeline to Continental's Baltimore Terminal. Continental's products (gasoline and distillates) are sold to purchasers doing business in Maryland as well as to purchasers located in states other than Maryland, such as Pennsylvania, Virginia and the District of Columbia. With respect to the purchasers doing business outside of the State of Maryland, a substantial part of the volume is delivered by Continental by its own trucks or common carriers engaged in interstate commerce.

The petroleum products distributed by Continental within the State of Maryland are received from the Colonial Pipeline, in that no other significant volume of petroleum products are received from any other transportation sources. The petroleum products sold in Maryland through the filling stations operated by Kayo



Oil Company and the petroleum products sold to Continental's wholesale customers at its Baltimore terminal, through the Onco Division of Continental Oil Company, receive no additives at Continental's Baltimore terminal of the Colonial Pipeline. The only additives that are added to Continental's product are pipeline corrosion and oxidation inhibitors which are added at Continental's Louisiana refinery, prior to transportation through the Colonial Pipeline into the State of Maryland.

As of June 30, 1975, Continental employed 225 persons in its marketing operations in Maryland. Its total payroll in the State of Maryland for the years 1971 through 1974 was, for each year, as follows:

1971 — $3,350,000.00
1972 — $2,650,000.00
1973 — $2,610,000.00
1974 — $3,136,000.00

Continental sold to wholesale purchasers from its Baltimore terminal, excluding petroleum products distributed to Kayo Oil Company, the following amount of petroleum products for the years 1970 through the first seven months of 1975:

1970 — 12,457,000 gals.
1971 — 14,573,000 gals.
1972 — 13,207,000 gals.
1973 — 13,214,000 gals.
1974 — 15,706,000 gals.
1975 — 9,903,000 gals.
(7 mos.)

Continental owns 100% of the capital stock of the Kayo Oil Company (hereinafter referred to as "Kayo") which is a Delaware corporation formed effective April 29, 1965. The duration of its charter is perpetual. Its principal and only office is located in Chattanooga, Tennessee.

Kayo is a gasoline marketing company and, therefore, has neither producing or refining capacity in Maryland or elsewhere nor has it terminals or bulk plants. It is a large private brand retail marketer of gasoline.

Kayo has 80 supervisory districts and each district is under the supervision of a manager. The manager has no staff and no separate or private office. He works out of one of the gasoline stations located within his district. Kayo has 16 area managers (the area manager supervises approximately 5 districts). The area managers have no staff working for them and also operate out of gasoline stations located within the area. Most, if not all, of Kayo's management have worked their way up to supervisory positions through promotions within the organization.

Kayo qualified to do business in the State of Maryland on January 10, 1964. It presently operates 14 filling stations in Maryland. There are six Kayo stations in Baltimore City and eight filling stations located in various other counties in Maryland.

Kayo obtains all of its gasoline which it sells at its retail outlets in Maryland from Continental. The gasoline is distributed to Kayo by Continental from Continental's Baltimore terminal, by means of Continental's trucks and common carriers, after the same has been shipped to the Baltimore terminal through the Colonial Pipeline.

Its Maryland stations were either built by it or were stations purchased and structurally modified to conform to the Kayo system of retail marketing. Kayo's investments in its existing company owned and operated stations in Maryland is as follows, as of June 30, 1975 — $676,525.00. Maryland sales of gallons of gasoline in 1972 were 14,964,980; in 1973, 15,952,928; in 1974, 13,396,566; and during the first half of 1975, 6,550,868.

The comparative sales by Continental to its wholesale purchasers from its Baltimore terminal and the



total number of gallons of gasoline sold by Kayo stations in Maryland are set forth in the following table:

| *Year* | *Continental Sales to Wholesalers* | *Kayo Sales to the Public* |
|---|---|---|
| 1972 | 13,207,000 gals. | 14,964,980 gals. |
| 1973 | 13,214,000 gals. | 15,952,928 gals. |
| 1974 | 15,706,000 gals. | 13,396,566 gals. |

As of June 30, 1975, Kayo employed 85 persons in its marketing operations in Maryland. Its total payroll in the State of Maryland for the years 1971 through 1974 was, for each year, as follows:

1971 — $500,000.00
1972 — $568,000.00
1973 — $405,000.00
1974 — $310,079.00

SHELL OIL COMPANY

Shell Oil Company (hereinafter referred to as "Shell") is a corporation organized and existing under the laws of the State of Delaware with its principal offices at One Shell Plaza, Houston, Texas. It was incorporated on February 8, 1922.

Shell is a company also involved in exploration for and the production of crude oil and natural gas and in the refining of crude oil, and the transportation and marketing, at both the wholesale and retail level, of a wide range of petroleum products. Shell-branded gasoline is sold at approximately 8,900 direct served retail outlets located in 40 states and the District of Columbia.

Shell has no crude oil production or petroleum refineries in Maryland. Consequently, purchasers of Shell-branded gasoline in the State of Maryland have all of their gasoline supplied from outside the State. Gasoline sold under the Shell brand in this state primarily comes from Shell's refineries at Deer Park,

Texas and Norco, Louisiana. The crude oil refined at these two refineries comes from both domestic and foreign sources. Domestic crude oil refined at Deer Park primarily comes from Texas and Louisiana. Domestic crude oil refined at Norco primarily comes from Louisiana.

Gasoline produced at Deer Park, Texas and Norco, Louisiana refineries is transported to two terminals which supply customers in Maryland. These terminals are located in Springfield, Virginia and Wagner's Point, Maryland. The gasoline is normally brought to the Springfield terminal by common carrier pipeline and to the Wagner's Point terminal by tanker.

The majority of Shell brand motor oil sold in Maryland comes from the Deer Park and Norco refineries where the base stock is made.

Shell does not believe that it is engaged in producing, blending or compounding motor vehicle fuels in the State of Maryland. Prior to distribution from Shell's Springfield, Virginia and Wagner's Point, Maryland terminals, additives are injected into gasoline and, in those rare instances when the product quality does not meet specifications, some premium gasoline is added.

All of the petroleum products sold by Shell at retail to the public in the State of Maryland are transported into the State of Maryland in interstate commerce. It markets its products nationally through the full range of retail facilities. As of June 30, 1975, Shell operated 180 tunnel car wash stations, 135 self-serve stations, 15 gasoline-only stations, 4 self-repair stations and 50 conventional full-service stations nationwide.

Shell has traditionally marketed its gasoline through independent retailers and wholesalers rather than through company operations. As of June 30, 1975, Shell operated with company personnel 384 service stations nationwide, representing approximately 4.3 percent of the approximately 8,900 Shell direct-served retail outlets.



As of June 30, 1974, Shell had 1 company-operated facility in the State of Maryland, representing approximately 0.5 percent of all directly operated facilities in Maryland at which Shell-branded petroleum products were sold.

Shell's one company-operated Maryland facility is a conventional full-service station. Shell's initial investment in that station, based upon dollar values at the time of original investment, was $49,285 for improvements, $36,630 for equipment and $12,800 for the 1973 ground lease rental payments; the lease for that property extends through 1988.

As of June 30, 1974, Shell had 196 stations operated by independent lessee dealers in Maryland. Shell currently has 7 branded jobbers in Maryland.

The following table shows the number of company-operated and direct-served dealer operated facilities in the State of Maryland selling Shell branded products for the years 1971 through the first six months of 1974:

PERIOD AS OF

| | *12/31/71* | *12/31/72* | *12/31/73* | *6/30/74* |
|---|---|---|---|---|
| Company Operated | 0 | 0 | 1 | 1 |
| Dealer Operated* | 203 | 206 | 206 | 196 |

* This includes dealer facilities which are either leased from Shell or another or owned by the dealer.

The following table shows the volume of gasoline in thousands of gallons sold through Shell branded direct-served facilities in the State of Maryland in 1973:

| *Total* | *Company Operated* | *% of Total* | *Non-Company Operated* | *% of Total* |
|---|---|---|---|---|
| 148,266,866 | 1,477,639 | 1% | 146,789,227 | 99% |

The following table shows the volume of gasoline in thousands of gallons sold through Shell branded direct-served facilities in the State of Maryland in the first six months of 1974:

| *Total* | *Company Operated* | *% of Total* | *Non-Company Operated* | *% of Total* |
|---|---|---|---|---|
| 68,558,649 | 793,104 | 1.2% | 67,765,545 | 98.8% |

The following table shows the volume of tires and batteries sold through Shell branded direct-served facilities in the State of Maryland in 1973:

| | *Total* | *Company Operated* | *% of Total* | *Non-Company Operated** | *% of Total* |
|---|---|---|---|---|---|
| Tires (units) | 29,279 | 155 | 0.5% | 29,125 | 99.5% |
| Batteries (units) | 10,329 | 25 | 0.2% | 10,304 | 99.8% |

* These figures reflect only wholesale sales by Shell to non-company operated stations. The dealers at these stations may purchase additional quantities of these products from other sources and sell them at retail.

In 1973 Shell's company-operated station had retail sales of $11,044 in house brand tires, batteries and accessories. This 0.6% of the wholesale sales by Shell of house brand tires, batteries and accessories to non-company operated stations.

In the first six months of 1974, Shell's company-operated station had retail sales of $7,968 in house brand tires, batteries and accessories. This is 0.7% of the wholesale sales by Shell of house brand tires, batteries and accessories to non-company operated stations.

The hours of operation at Shell's company-operated station have been as follows:

| *Date* | *Hours of Operation* |
|---|---|
| 3/1/73-12/15/73 | 24 |
| 12/15/73-1/15/74 | 18 (6 a.m. - 12 p.m.) |
| 1/15/74-5/1/74 | 12 (6 a.m. - 6 p.m.) (closed Sundays) |
| 5/1/74 | 15 (6 a.m. - 9 p.m.) (open Sundays) |



Though Shell has only one company-operated station in Maryland, the following is a list and explanation of innovative marketing concepts and products tested nationally at Shell company-operated stations:

*Full self-service* — This type of retail outlet allows the consumer to perform all required services, including the dispensing of automotive gasoline.

*Gasoline only* — In this type of outlet, the consumer is offered, by an attendant, only gasoline and other pump island services.

*Tunnel car-wash* — This denotes an outlet that offers specialized equipment for washing an automobile. Although such equipment may be found in both dealer and company-operated stations due to the large capital investment required.

*Self-repair* — This type of outlet, which is currently being evaluated by Shell, offers the consumer, in addition to gasoline, all the necessary tools and facilities to repair his own automobile. The customer rents a service bay at a per hour cost and he has use of all tools and instruction manuals. There is also a technician on duty.

*Mini-mart* — This type of outlet, which is currently being evaluated by Shell, would offer the consumer, in addition to some or all of the traditional services and products, various non-petroleum related products to satisfy his needs.

*Motor lab* — This type of outlet was based on the viability of certain diagnostic and repair equipment. After thorough testing and evaluation, it was determined that such equipment did not meet marketing needs and standards.

*Express oil changer* — Through an Express vacuum-stick which removes used automobile oil, the express oil changer allows the customer to perform an inexpensive, clean and fast oil change.

*Computerized gasoline pump* — This allows a customer to fulfill gasoline, motor oil and car wash and

wax needs at all times and without delay. The pump accepts either cash or credit card for the products and services selected.

*Pilfer-proof oil merchandiser* — This is a display stand with the capacity to hold 48 quarts of motor oil. Due to its locking mechanism, it dispenses with the necessity of securing the merchandise when the station closes and thus allows for continuous display of the product. It also contains a protected area for a credit card imprinter and a light weight oil can disposal unit.

*Autosense* — This computer oriented device identifies all automobile repair needs. It improves productivity by releasing mechanics for repairs and eliminates the possibility of human error.

*Shell gasoline and motor oil* is constantly being tested and evaluated.

Shell recognizes certain geographic areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such "trading areas" it has, in order to meet the equally low price of a competitor of Shell, temporarily reduced its wholesale price or granted temporary allowances to its dealers or jobbers without making a general price reduction or allowance throughout the State.

The normal business practice of Shell is not to extend temporary allowances, price adjustments or rent relief "uniformly to all retail service station dealers supplied" either within the State of Maryland, or nationwide.

Shell has on occasion granted to its lessee dealers in Maryland rental abatements or rental modifications.

When Shell leases a service station facility to a dealer, the Shell-owned equipment at the station is included in the lease agreement.

From January 1974 to September 1, 1975, the sale of gasoline in Maryland and in the United States was regulated by the federal government pursuant to the Emergency Petroleum Allocation Act of 1973 and the regulations issued thereunder.



## GULF OIL CORPORATION

Gulf Oil Corporation (hereinafter referred to as "Gulf"), a Pennsylvania corporation, is involved in exploration for and production of crude oil and natural gas and in refining, transporting and marketing, at both the wholesale and retail levels, of a wide range of petroleum products. Gulf-branded gasoline is sold at approximately 18,430 retail outlets throughout the United States. Gulf also has interests in coal, atomic energy and other resources which could become energy producing in the future.

Gulf has done business in Maryland for more than 40 years, and is the third leading supplier of gasoline in Maryland, selling to dealers, wholesalers, the public, and others approximately 9% of all the gasoline sold in Maryland. All of the gasoline sold by Gulf in Maryland is transported into the state from refineries located beyond the borders of the state.

In 1936 Gulf opened its first modern service stations in the Baltimore area. Prior to that time, Gulf had some bulk plants in Maryland and operated on a limited basis at the wholesale and retail levels in the state. At the present, however, insofar as petroleum products are concerned, operations by Gulf in Maryland are limited to storage, distribution and marketing. It does not produce or refine motor vehicle fuels in the State of Maryland. Purchasers of Gulf branded gasoline in Maryland have all of their gasoline supplied from and refined out of state. Gulf-refined products reach the Maryland market as follows:

a. Gasoline from Port Arthur, Texas, and Alliance, Louisiana, enters the State of Maryland via the Colonial Pipeline. Gasoline from Philadelphia, Pennsylvania, enters the State of Maryland either by barge or truck.

b. Three Gulf terminals serve customers in Maryland. These are located at Baltimore and Salisbury, Maryland, and Fairfax, Virginia. The Baltimore and Fairfax terminals are supplied by the Colonial Pipeline.

The Salisbury terminal is supplied via barge from Philadelphia. Customers in Maryland are also served by bulk plants in various parts of Maryland and one bulk plant in Delta, Pennsylvania. Some of these bulk plants are supplied by truck from the various terminals; oth. s are supplied directly by barge from Philadelphia.

c. All motor oils sold in Maryland originate from the Philadelphia refinery, and are shipped by truck to terminals and bulk plants in Maryland, Fairfax, Virginia and Delta, Pennsylvania.

d. All greases are packaged by the Port Arthur refinery and shipped via tanker to Philadelphia, and thereafter by truck to terminals and bulk plants.

In rare instances, upon notification from the State of Maryland that Gulf's product is not in compliance with state-required specifications, Gulf mixes different grades or types of gasoline in order to bring the product into compliance. For example, Gulf may add premium gasoline to regular grade gasoline with too low an octane rating. The product would then be sold as regular gasoline. Also, if the lead content of a small volume of low-leaded gasoline is too high, it may be added to a large volume of low-leaded gasoline, so that the lead content of the resulting product is within specifications.

In 1974, 87,768,000 gallons of gasoline were sold by Gulf service stations in Maryland; in 1973, 82,983,000 gallons of gasoline were sold by Gulf service stations in Maryland.

Gasoline from out-of-state refineries is transported to Gulf's terminals in Baltimore and Salisbury and to bulk plants in various parts of Maryland from which retail gasoline outlets in Maryland and elsewhere are supplied. Some Maryland retail outlets are supplied from out-of-state terminals or bulk plants. Based upon August 1975 crude runs, which are typical, all of the Gulf gasoline sold in Maryland is refined at either Gulf's Port Arthur, Texas, refinery, its Alliance, Louisiana, refinery or its Philadelphia, Pennsylvania,



refinery. More than half of the crude oil processed at Gulf's Alliance and Port Arthur refineries is of domestic origin, with the balance imported from Nigeria or from Cabinda, West Africa. All of the crude processed at Gulf's Philadelphia refinery is imported from Venezuela, Nigeria and Cabinda, West Africa.

Tires, batteries and accessories sold at Gulf retail outlets, both company-operated and dealer operated, are manufactured by companies other than Gulf in various places outside of the State of Maryland and shipped into Maryland in interstate commerce.

The consumer in Maryland is served by various kinds of Gulf retail gasoline outlets. These include 1 major service center, 2 drive-through car wash facilities, 8 stations having in-bay car wash facilities, 101 merchandisable service stations (i.e. full service) 3 full and 12 partial self service stations. The balance of the Gulf retail outlets in Maryland consists of country grocery stores (Ma and Pa) with gasoline pumps, small garages and other diversified businesses with gasoline pumps, these being the facilities that, in Gulf's opinion, fill the needs of the communities in which they are located.

Gulf's position is that it can best serve consumers and itself by using different types of retail gasoline outlets and marketing methods, and the company has in fact, where possible, varied its marketing methods in response to market conditions.

Since approximately 1952 Gulf has marketed its gasoline primarily through independent retailers and wholesalers rather than through company operations.

As of September, 1975, there were approximately 218 independent dealer stations in Maryland buying Gulf gasoline directly from Gulf, of which approximately 109 leased stations from Gulf and 109 own their own stations or lease them from parties other than Gulf. There is one company-operated Gulf station in Maryland. If it is permitted to continue to own and operate retail service stations in Maryland, Gulf anticipates owning and operating approximately 22 retail gasoline

outlets within the next five years.[6] It has refrained from commencing ownership and operation of these stations[7] pending this litigation.

Gulf's experience with company-operated service stations shows that under certain circumstances, company operation is a more efficient mode of direct marketing of gasoline by Gulf. Through direct company operations, Gulf can control hours of operation and service and may respond quickly to price changes in the market. In the opinion of Gulf's management direct company operations can result in significantly lower selling costs per gallon of gasoline than a traditional dealer-operated station. These reductions in selling costs might be passed on to the consumer in the form of lower gasoline prices.

The ability to market through company-operated stations allows Gulf to experiment with innovative, competitive marketing techniques. Such outlets represent an alternative marketing technique, rather than an exclusive mode of marketing. However, in certain circumstances, company-operated stations represent the most desirable and efficient retail technique, from the standpoint of Gulf.

From Gulf's viewpoint, other possible advantages of company-operated stations are:

a. High standards of service and cleanliness.
b. High standards of design; generally attractive appearances.
c. Longer hours of operation to serve the public.
d. Fast "no frills" sales, for that portion of the public which desires them.

[6] Nineteen of the 22 are presently operated by lessee dealers; two are temporarily closed and under reconstruction; and one is already company owned and operated. As to the 19 lessee dealers, Gulf's policy and intention are to attempt to negotiate a buyout of their operations. Any lessee dealers who decline to sell may remain in business as usual.

[7] Except for one station owned and operated since prior to the commencement of this litigation.



Company-operated stations can be used for testing new market techniques. For example, Gulf first tested its "Tire Hut" discount auto, home and garden outlets at company-operated stations outside of Maryland.

In Gulf's opinion Gulf company-operated stations are able to quickly and effectively respond to changing market conditions. During times of shortage, Gulf's control over its company-operated stations would permit Gulf to coordinate hours of operation in order to attempt to lessen the hardship on motorists.

In Gulf's management's opinion the divorcement of Gulf's company-operated station will diminish its value. Furthermore, the provisions of the Maryland Act which prohibit Gulf from operating retail service stations in Maryland will preclude the conversion of any Gulf properties in Maryland to company owned and operated service stations.

Gulf's investment in its existing company-operated station in Maryland is as follows:

| | |
|---|---|
| Land | $78,510.00 |
| Building | 53,424.00 |
| Equipment | 33,977.00 |
| TOTAL | $165,911.00 |

The granting of price differentials and allowances has been a normal business practice of Gulf.

Gulf stations in Maryland serve a market composed of consumers operating both in interstate and intrastate commerce. A sampling of consumers in interstate commerce includes: truckers — Chemical Leaman, Carolina Freight, Eastern Express, Johnson Motor Lines and O'Boyle Tank Lines; railroads — The Chessie System, Penn Central Railroad and Southern Railway System; airlines — Eastern, BOAC, Braniff, TWA, Northwest Orient and National. Maryland borders several jurisdictions — Delaware, Pennsylvania, West Virginia and the District of Columbia. Maryland falls within the Washington-New York-Boston corridor and

lies between the major metropolitan areas of Washington, D.C. and Wilmington-Philadelphia.

Gulf recognizes certain competitive trading areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such trading areas it has, in order to meet competition from other suppliers, granted temporary competitive allowances to its dealers or resellers without granting such allowances throughout the state.

Some of Gulf's trading areas cover geographic areas which cross the boundaries of the State of Maryland into adjoining jurisdictions, including the District of Columbia, Virginia, Delaware, Pennsylvania and West Virginia.

The normal business practice of Gulf has never included any program whereby it extended temporary competitive allowances "uniformly to all retail service station dealers supplied" either within the State of Maryland or nationwide. Gulf is not aware of any violations of law by Gulf in the use of any such allowances in the State of Maryland.

When Gulf leases a service station facility to a dealer, such Gulf-owned equipment as pumps, tanks, lifts, lights and air compressors are included in the lease agreement and the lease rental. Other items of Gulf-owned equipment, such as identification signs and credit card imprinters, are separately rented to the dealer. Gulf does not apportion the rental for a fully equipped service station between the equipment included in the lease and the real estate.

Gulf has on occasion granted to its lessee dealers in Maryland rental abatements or modifications for various reasons.

## PHILLIPS PETROLEUM COMPANY

Phillips Petroleum Company, hereinafter referred to as ("Phillips") is an integrated petroleum company based in Bartlesville, Oklahoma. It is engaged in production, refining, processing and marketing of



petroleum products of all varieties and various derivatives of petroleum. It has six domestic crude oil refineries, all of which are located west of the Mississippi River, two in Texas, one in Kansas, one in Utah, one in Montana and one in California. A subsidiary, Puerto Rico Core, Inc., owns and operates a petrochemical manufacturing plant in Puerto Rico that uses chemical feedstocks but produces some gasoline as a by-product.

The crude oil production of Phillips is mainly in the Mid-Continent region of the United States. There is, of course, some production from foreign sources. This company engages in no crude oil production and has no petroleum refineries within the State of Maryland. All Phillips-branded refined petroleum products available at Phillips-branded stations in Maryland are supplied from outside the State. Insofar as Phillips' operations in Maryland related to refined petroleum products are concerned, Phillips is only a supplier and a marketer. Phillips does lease segregated bulk storage tanks for refined products at the Amerada-Hess terminal in Baltimore.

Phillips was incorporated in the State of Delaware in 1917. At one time it marketed in all of the 50 states, and at present it markets to some extent in all of the states except Alaska and Connecticut. Phillips first began operating in Maryland as a marketer of petroleum products in 1960. It presently is qualified to do business in the State of Maryland and has been so qualified since 1960. Phillips markets its refined petroleum products in Maryland under the principal Phillips brands, such as Phillips 66 Regular, Phillips 66 Premium, and Phillips 66 Unleaded and also under its secondary or private brands such as Way-Lo Regular, Way-Lo Premium, and Way-Lo Unleaded. These trade names or brands are registered federally and also in Maryland.

For purposes of marketing, the company operations are divided into three geographic regions, a Western

region, a Central Region and an Eastern Region, as shown on the map in the attached Appendix. The State of Maryland is within the Eastern Region. In marketing petroleum products, Phillips is a wholesale supplier of gasoline, distillates, motor oils and greases to jobbers, dealers and ultimate consumers.

Phillips also is a wholesale supplier of tires, batteries, accessories and sundry items of merchandise. Phillips also is a retailer of the same products and also service work in Phillips-branded, salary-operated service stations. In some situations, Phillips retails all of these items except service work, and in some instances, except tires, batteries and accessories, in secondary or private branded stations.

During the period January 1, 1969 to date, substantially all of the automotive gasoline marketed by Phillips, other than through its own salaried service stations, was marketed by selling to independent businessmen or companies that are not employees or agents of Phillips. Phillips has been basically a jobber-oriented company, by which is meant that it historically has sold its branded products to wholesale distributors (jobbers) for resale through their own service stations or to independent dealers operating service stations. Phillips does sell some of its refined petroleum products directly to some of the independent dealers.

Jobbers are independent businessmen or companies who purchase petroleum products directly from Phillips and either market them through their own facilities or resell to their wholesale consumers or their dealers for further resale to retail consumers. Nationwise through the years 75% to 80% of Phillips products have been sold to jobbers. Today about 67% of all gasoline which Phillips sells in Maryland is sold to jobbers. Approximately 17% is sold directly to the public through Phillips-salaried service stations, and about 16% is sold directly to independent dealers who also are usually independent businessmen who employ one or more



people either on a part-time or full-time basis to operate a one or a multi-bay service station offering a line of gasoline and other petroleum products and allied services and items within their discretion.[8] Some of these dealers own their service stations, but most lease their service stations either from Phillips or from Phillips jobbers or third parties.

Nationwide, during the 1969-1973 period, the ratio of salary-operated service stations to the total number of retail outlets for Phillips products varied from a high of about 5.4% to a low of 1.6% during such period. In Maryland, for this same period, the ratio of salary-operated service stations to the total number of retail outlets[9] varied from a high of 14.05 percent to a low of 7.88 percent. Appendix B contains a statement of the approximate number of outlets for Phillips products operated during 1974 within the various geographic regions and the percentage thereof that were salary-operated by Phillips.

In Maryland at present, there are approximately 121 retail outlets for Phillips products, of which 13 are salary-operated units. Nationwide, there were on

[8]

| | *1973* | | *1974* | |
|---|---|---|---|---|
| | *% of Business* | *Gallons* | *% of Business* | *Gallons* |
| Salaried Operations | 20.16 | 7,364,690 | 17.2 | 5,077,551 |
| Direct Dealers | 17.34 | 6,335,444 | 15.89 | 5,520,253 |
| Jobbers | 62.50 | 22,837,487 | 66.91 | 23,245,570 |
| Total | 100.00 | 36,537,621 | 100.00 | 34,743,334 |

In 1974 Phillips salaried service stations and direct dealers (i.e. independent dealers buying refined petroleum products directly from Phillips) shared a smaller percentage of the refined petroleum products sold directly to the public than in 1973; correspondingly, the percentage of sale by jobbers increased.

[9] The number of the total retail outlets for Phillips products is an approximate figure, both for Maryland and nationally. For the reasons for the unavailability of accurate figures, see next paragraph.

November 25, 1974 approximately 17,000 total retail outlets for Phillips products of which number exactly 1,043 were salary-operated units. A precise total as to the number of salary-operated units can be given because these are a matter of company record and are under Phillips' immediate control. Phillips cannot at any time be absolutely certain as to the total number of outlets throughout the country or within any individual state because it does not control the entrance into business or the exit from business of dealers who sell petroleum products under the Phillips signs, but who have their contracts with jobbers and not with Phillips, nor can it control the number of jobber-operated stations. Phillips leases to jobbers a quantity of Phillips signs and credit-card imprinters, and the jobbers utilize these within their sole discretion in putting new dealers in business. Jobbers can acquire new dealers or open stations with their own employees at any time without any prior notice to Phillips or without any control by Phillips over such acquisition or any later termination of the dealers. It would take a day-to-day count of these locations as actually in place and operating for Phillips to be able to ascertain with even approximate accuracy the number of outlets selling Phillips products on any specific day.

Of the 1,043 company-operated outlets, which include 13 Maryland outlets, some sell Phillips' principal brands, only and others sell secondary brands, only. The ratio between these categories varies almost daily. Nationally, from 1969 to 1973 Phillips' distribution of branded product by sale to wholesale distributors for resale decreased from 54.2 percent to 48.2 percent, while unbranded sales to wholesale distributors increased from 16.5 percent to 24.8 percent. To the contrary, in Maryland during the same period of time branded sales increased from 53.7 percent to 62.5 percent, but there has never been any unbranded sales by Phillips to wholesale distributors in Maryland.



An appreciable number of the service stations operated by jobbers or by jobbers' dealers are either owned in fee by the jobbers, or leased by them from Phillips or from third parties. Phillips exercises no control over the day-to-day operations of the independent dealers whom it supplies directly or over the independent jobbers. Where real estate leases are in effect, there are, of course, some limitations and some requirements related to use of the premises. In all instances, there is some control exercised as necessary to protect quality of products, to avoid adulteration of products, and to protect brands. The setting of retail prices at stations operated by jobbers, direct dealers or jobber-dealers is at the sole prerogative of the jobber, direct dealer or jobber-dealer.

All of Phillips' petroleum products move into Maryland in interstate commerce. The tires, batteries and accessories sold in Phillips' salary-operated service stations in Maryland also come into such state in interstate commerce.

At present, of the approximate total of 121 marketing outlets in Maryland for the retail sales of Phillips' brands of gasoline and other petroleum products, approximately 108 are service stations operated by persons or companies who are not Phillips' company personnel, subsidiaries, or commissioned agents, but who buy gasoline and other petroleum products from Phillips for wholesale or retail sale. Eighty-eight of these stations are operated by jobbers or by dealers of jobbers, and the remaining 20 are operated by dealers supplied directly by Phillips. The other 13 service stations within Maryland are operated by salaried personnel of Phillips, with 10 selling only Phillips' principal brands and three selling only Phillips' secondary Way-Lo brands.

At the present time Phillips owns in fee only five service station properties in the State of Maryland. All five are leased directly to dealers. Phillips presently leases from others 44 service stations in Maryland of

which it subleases 17 to jobbers and nine to direct dealers, operating 13 with its company employees. Five of these leased stations are presently vacant or are being rented by third parties for other purposes than retail marketing of Phillips' products. The following is a resume of Phillips' investment in marketing properties in Maryland.

| | |
|---|---|
| Phillips service station investment | $1,348,858.88 |
| Phillips loaned equipment investment[10] | 150,201.20 |
| Phillips TBA lube warehouse investment[11] | 19,641.72 |
| TOTAL | $1,518,696.80 |

The above are net figures as of a time within the last six (6) months as to each property, after deducting depreciation; initial investments were greater.

Attached hereto as Appendix C[12] is a list of the thirteen (13) Phillips service stations operated in Maryland by Phillips personnel. The list includes the company station number, the type of operation and approximate net investment of Phillips. The "Private Brand Express" label identifies the three secondary brand, Way-Lo, stations which are not full-service stations. The "Vanguard" label identifies the other ten which are operated as Phillips branded units. Seven (7) of the stations are leased under long-term lease by Phillips from outside parties who own or lease the land and own the improvements. Phillips' net investment as to these is usually minimal because it normally involves only equipment. One station is located on leased land and is improved with service station improvements owned by Phillips. The remaining five (5) stations are leased by Phillips from a lessor with whom there is an agreement that Phillips must hold

[10] Phillips loaned equipment investment consists of equipment, such as car-lifts and storage tanks, loaned to consumer accounts.

[11] Phillips TBA lube warehouse investment represents warehouse facilities only.

[12] The total net investment reflected in Appendix C is a part of, and included in, the total investment figure of $1,518,696.80 reflected in the preceding paragraph.



such party harmless from any loss on the investments. There is an additional $527,239.37 invested in these properties by such lessor. In all instances the investment figure is after deduction of depreciation.

## PETROLEUM MARKETING CORPORATION AND COMMONWEALTH OIL REFINING COMPANY, INC.

Petroleum Marketing Corporation (hereinafter referred to as "PMC") is a Delaware Corporation qualified to do business in the State of Maryland and Commonwealth Oil Refining Company, Inc., is a Puerto Rico Corporation (hereinafter referred to as "Commonwealth").

Commonwealth, a company organized in 1953, is directly engaged in the refining of petroleum products and, through subsidiary corporations and joint ventures, is exclusively engaged in the production of petroleum, aromatics, and other petrochemicals and petroleum products. These activities are carried on at a petroleum refinery and petro-chemical complex located at Penuelas, Puerto Rico. It is totally dependent upon foreign sources for its crude oil supplies. Commonwealth has no plant or facilities in the State of Maryland.

Since 1970, Commonwealth has marketed gasoline, motor fuels and lubricants through PMC which, in June, 1975, was operating 123 retail gasoline stations, under the federally-registered trademark "SCOT" in the Middle Atlantic and Northeastern States.

PMC has been engaged in the sale of petroleum products at wholesale and retail in the State of Maryland since 1955. It conducts retail sales of gasoline and other petroleum products in intrastate and interstate commerce through 20 gas-only outlets and one commissioned-agent relationship, which sells gasoline at wholesale and retail, located in the State of Maryland, as indicated on the map (Appendix D); PMC employs 196 persons at its Maryland retail facilities.

PMC does not change or alter the molecular structure of the refined products that it distributes in any of its facilities, storage tanks or stations in the State of Maryland. The products that PMC handles and distributes either for itself or others, enter PMC facilities from its supplier, Commonwealth, and leave in their original form.

All "SCOT" retail facilities in the State of Maryland are company-owned and company-operated by PMC. It has traditionally attempted to sell gasoline and motor oils in Maryland at a price less than those generally charged by major oil companies. "SCOT" retail outlets do not provide services such as repairs, oil changes, and greasing, available at most service stations. "SCOT" retail facilities do not sell tires, batteries or other accessories available at most service stations.

Beginning in April of 1970 when PMC was acquired by Commonwealth, it has purchased the major quantity of the gasoline offered for retail sale at its 20 Maryland "SCOT" retail facilities from Commonwealth. In recent months, the price of gasoline purchased by PMC from Commonwealth has increased.

Commonwealth and PMC have only the stated business relationship with "SCOT" retail gasoline outlets in the State of Maryland; neither company has any dealership or franchised arrangement at any "SCOT" retail outlet.

## ASHLAND OIL, INC.

Ashland Oil, Inc. (hereinafter referred to as "Ashland") is a Kentucky corporation with its principal offices at P.O. Box 391, Ashland, Kentucky, 41101.

Ashland Petroleum Company, is a wholly owned subsidiary of Ashland Oil, Inc., primarily engaged in the business of refining crude oil and the transportation and marketing of petroleum products. Ashland does engage in some exploration for, and production of, crude oil. However, Ashland's crude production (approximately 30,000 barrels per day in 1974) represents less



than 15% of the crude oil which it refines daily in its refineries. Ashland purchases 85% of the crude oil used in its refineries from sources it neither owns nor controls.

Ashland has seven crude oil refineries with an aggregate refining capacity of approximately 385,000 barrels per day. These refineries are located in the Eastern and Upper Midwestern regions of the United States: two are in Kentucky, two are in Ohio, one is in Minnesota, one is in New York and one is in Pennsylvania.

Ashland engages in no crude oil production and has no petroleum refineries within the State of Maryland. Its operations in Maryland are limited to the supplying and marketing of petroleum products.

None of the petroleum products which Ashland supplies or markets in Maryland comes from an Ashland refinery. All of the petroleum products sold in Maryland, either to an Ashland customer or through an Ashland owned filling station, are purchased from another oil company through exchange agreements. All of the petroleum products sold by Ashland at retail in Maryland are transported into Maryland in interstate commerce.

Ashland owns its stations, and operates with company personnel only at 17 locations in Maryland, under trade names "Redhead," "Bi-lo" "Payless," and "Hi'Fi." Of these 17 stations, seven are in the Baltimore vicinity; the others are located in White Marsh, Aberdeen, Laurel, College Park, Cambridge, Cumberland, Adelphi, Suitland, and Salisbury. These "gasoline-only" stations, either have no service or carwash bays, or have them sealed off. They do not sell tires, batteries, or accessories, and have no travel maps or other traveler aids. Ashland does not provide credit cards to these stations and engages in no advertising of the brands Redhead, Bi-Lo, Payless, or Hi-Fi.

Ashland does not market gasoline at retail in Maryland at any other facility other than those listed

above. Ashland, has never sold gasoline in Maryland through independent retailers known as "branded" dealers or "lessee" dealers. No gasoline is sold in Maryland under the "Ashland" brand. Ashland has owned and operated company-owned filling stations in Maryland continuously since 1961.

Its investment in the above filling stations as of September 30, 1974, was $2,381,385.

The following table sets forth Ashland's volume of sales of gasoline in Maryland in gallons through its 17 filling stations during 1971, 1972, 1973 and 1974.

| | |
|---|---|
| 1971 | 20,255,934 |
| 1972 | 25,989,410 |
| 1973 | 30,498,150 |
| 1974 | 26,959,471 |

The normal hours or operation for Ashland's stations are 6:00 A.M. to 12:00 P.M. each day. It employs approximately 220 persons in its marketing operations in Maryland.

In states other than Maryland, Ashland markets petroleum products through 699 company operated stations and 640 independent leased "dealer" stations. Of the company operated stations, 698 are gasoline only stations, of which 193 are self-service, and one is a conventional service station. Of the 640 dealer stations, none are gasoline only; all are conventional stations.

## THE DEFENDANTS

The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland.

The defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek injunctions against persons who violate Article 56 of the Annotated Code of Maryland.



The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations.

Plaintiffs have no adequate remedy at law.

An actual controversy exists between the parties and antagonistic claims are present between the parties which will result in imminent and inevitable litigation. The controversy can be determined by a declaratory decree setting forth the rights of the parties and any other relief deemed proper by the Court.

## *DEFINITIONS*

The following definitions are accepted for purposes of construing Chapter 854 of the Laws of Maryland 1974 in connection with this litigation only.

a. Retail service station dealer is defined in § 157A of Article 56 and means any person, firm or corporation maintaining a place of business where motor vehicle fuel is sold and delivered into the tanks of motor vehicles.[13]

b. Motor vehicle is defined in § 135 of Article 56 and means all vehicles, engines, machines or mechanical contrivances which are propelled by internal combustion engines or motors, upon the public highways, and in the case of vehicles propelled by Diesel fuel or fuel oil, shall mean all such vehicles licensed to operate upon the public highways.

[13] Petroleum Marketing and Continental Oil do not accept this definition.

## *STIPULATION OF GENERAL FACTS*

Legislative History of Chapter 854.

By letter dated June 13, 1973, Governor Marvin Mandel formally requested Louis L. Goldstein, Comptroller of the Treasury, to conduct a study of gasoline retailing in Maryland to determine whether the shortage of petroleum products experienced in the State was real or contrived by plaintiff and other refiners, suppliers or marketers and to determine whether company-operated stations received more favorable allocations of gasoline than did independent dealers.

Pursuant to the Governor's request, a survey questionnaire requesting information on price changes, supply and allocation quotas, hours of operation, "voluntary allowances" and other types of "dealer aid" and sales limitations to customers, was prepared by the Gasoline Tax Division of the Comptroller's Office under the direction of Arthur E. Price, Chief Motor Fuel Inspector, and mailed on June 29, 1973 to 4,055 gasoline service station dealers within the State of Maryland.

One thousand four hundred seven questionnaire returns, completed in whole or in part, or 34.7 percent of the 4,055 service station dealers sent questionnaires, were received by the Gasoline Tax Division. Based on comments received in those questionnaires, follow-up investigations were conducted involving approximately 100 dealers. The responses were tabulated on work sheets and a summary table entitled "Recap by Brand" was prepared. From the Recap and Work sheets, a written analysis of the survey results entitled "Results and Analysis of Service Station Dealers Questionnaire" was prepared by Arthur Price. This analysis was submitted to Governor Mandel for his consideration on September 6, 1973.

Pursuant to the Governor's request of June 13, 1973, the Gasoline Tax Division of the Comptroller's Office prepared and mailed on July 17, 1973 a questionnaire to twenty oil companies in order to evaluate further the



aforementioned request of Governor Mandel. This questionnaire requested information on company activity within the State of Maryland in the areas of: retail service station operations; new and planned service station construction; past and projected sales volumes; allocation formulas; closing of various types of stations; cancellation and/or nonrenewals of contracts; price increases to customers; elimination of voluntary allowances, rental abatements or other "dealer aid;" company policy regarding hours of operation of its branded service stations; and acquisition of new toll-road accounts for the period of June 30, 1972 through June 30, 1973.

Eleven oil companies responded, in whole or in part, to the oil company questionnaire. A written analysis of the survey results entitled "Analysis of Major Oil Companies Questionnaires," was prepared by Arthur Price and John K. Coleman. This analysis was submitted to Governor Mandel for his consideration on September 28, 1973.

A written report entitled "Analysis of Comparative Report of Taxable and Exempt Gasoline Sales for the Calendar Year 1971, 1972, and the First Six Months of 1973" was submitted to the Governor by the Comptroller on September 6, 1973. This analysis was prepared from the computer data collected by the Gasoline Tax Division.

At the instruction of the Comptroller, John K. Coleman, Gasoline Tax Division of the Comptroller's Office, drafted a bill purportedly to correct certain alleged inequities said to be based on the returns of the survey questionnaire sent to the retail service station dealers. The returns purportedly formed the basis for the report entitled "Results and Analysis of Service Station Dealers Questionnaire" which had been submitted to the Comptroller and sent to the Governor on September 6, 1973. A draft of the bill was sent to the Governor by Comptroller Goldstein on September 13, 1973.

After several discussions with the Governor and his staff, Comptroller Goldstein, by letter dated January 7, 1974, forwarded proposed legislation to the Governor's Office prohibiting producers, refiners, and wholesalers of petroleum products from operating retail service stations, requiring all such entities to extend all voluntary allowances and equipment rentals uniformly to all dealers throughout the State.

Identical bills (House Bill 918, by Delegate Bonvegna and Senate Bill 465, by Senator Pine) were introduced in the two houses of the General Assembly during the 1974 session. These bills were the same as the draft bill prepared by John Coleman. Both the House and Senate bills were amended to limit the prohibition on the operation of retail service stations to producers and refiners, by deleting the term "wholesaler." In addition, paragraph G was added to both versions of the bill permitting the Comptroller to adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer operated station. In addition, paragraph H was added to Senate Bill 465 permitting the Comptroller to grant exceptions to the divestiture dates specified by the statute.

Public hearings were held by both the Senate and House committees considering these respective bills. At the public hearing on S.B. 465 before the Senate Committee on Economic Affairs held on February 20, 1974, a total of 16 witnesses registered to appear and testify on the bill. Eight (8) opponents represented the following companies or associations: Exxon Corporation, BP Oil Corporation, Shell Oil Company, Southern Maryland Oil Co., Wise Petroleum Co., Blue Ridge Oil, Maryland Petroleum Association and Maryland Oil Jobbers Council. And a total of eight (8) witnesses appeared and/or registered to testify as proponents of the bill, including the Honorable Louis L. Goldstein, Comptroller, who testified and submitted copies of his Office's aforementioned reports to the Governor and to



the Economic Affairs Committee for their review and consideration. At the public hearings on H.B. 918 before the House Economic Matters Committee held on March 7, 1974 a total of seven (7) witnesses registered to appear and testify on that bill.

Both bills were passed during the 1974 Session of the General Assembly, and Senate Bill 465 which eventually was to be signed into law was passed by a vote of 26-0 (17 absent — no votes), and in the House by a vote of 90-15 (37 absent no votes).

Prior to signing the bill into law, the Governor held a special veto hearing on S.B. 465 and H.B. 918 at which time he invited and received for consideration the views of both proponents, as well as opponents of the legislation. At this special hearing before the Governor, which was held on May 29, 1974, a total of fifteen (15) witnesses appeared to testify on S.B. 465, of which number, seven (7) witnesses registered to appear and testify as opponents of the bill, representing five (5) oil companies, and the business community. Eight (8) witnesses registered to appear and testify as proponents of said bill. Senate Bill 465 was signed into law by Governor Mandel on May 31, 1974 and became Chapter 854 of the Laws of Maryland of 1974.

Chapter 854 of the Laws of Maryland was amended during the 1975 Session of the Maryland General Assembly by Senate Bill 797 which was enacted into law as Chapter 608 of the Laws of Maryland of 1975, adding to paragraphs B and C of the statute a further prohibition on operation of service stations by a producer or refiner under a contract with any person for management of a service station on a fee arrangement. The amendment requires that service stations be operated by a retail service station dealer.

*Retail Marketing in Maryland*

The consumer in Maryland is served by various kinds of gasoline service stations or outlets in terms of the products and services offered. They include major

service centers, combination service station-car wash facilities, turnpike stations, truck stops, conventional service stations, limited service operations offering gasoline but no other driveway services, and full and partial self-service stations.

Retail stations are operated under various arrangements. There is the direct retailing of gasoline by the supplier, which the law being challenged in this suit would prohibit insofar as that supplied is a producer or refiner of petroleum products. Such direct retailing occurs through operation of the supplier's facility by the supplier's employees, or by employees of a subsidiary company or division. The other major category of retail marketing is performed by independent dealers who operate service stations and resell gasoline sold to them by a supplier. Some individual dealers own their own service stations or lease them from a non-supplier and have a supply contract with a branded or unbranded supplier; others lease a station from a supplier who also supplies them with product.

According to the records of the Gasoline Tax Division of the Comptroller's Office, there were approximately 3,995 retail stations in the State of Maryland on December 31, 1972, 3,798 retail stations on December 31, 1973, and 3,757 retail stations on July 1, 1974.[14]

While there are various types of retail gasoline stations in the State of Maryland, generally they can be divided into two types: (a) major brand stations and (b) private brand stations. The general characteristics of a major brand station are that the brand name is advertised, repair services are generally performed, credit cards are usually accepted, and historically the emphasis is on methods of non-price competition, i.e. service, credit, games, give-aways, etc. The general characteristics of a private brand station are that the brand itself is generally not advertised, limited or no repair services are provided at the station, generally no

[14] Appendix E lists the number of stations in Maryland operated by producers or refiners.



credit cards are accepted, and the emphasis on the price of gasoline is usually greater than the price at major brand stations, since it is generally lower. While there are examples of service stations that do not fit exactly into these categories, the vast majority of stations do. The majority of major brand stations are operated by independent service station dealers. The majority of private brand stations are operated on a company-operated basis, that is, the company that owns the brand name (even though not advertised) runs the station with its own employees.

Retail petroleum marketing in the State of Maryland is and has been a highly competitive industry. This is a result of the number and location of available facilities, the comparatively small capital costs for entering the business, the mobility of the purchaser at the time of purchasing the products, the relative interchangeability of one competitor's products with another in the mind of the consumer, the visibility of price information, and the many choices the consumer has in terms of prices, brands, and services offered.

The first witness offered by plaintiffs was Richard T. Harvin, Retail Sales Manager of Exxon for its Eastern Sales Region. He had been with the company for 13 years in a number of capacities. He stated that the major petroleum brand marketers such as Exxon market their products in many different ways in an effort to attract the wide range of consumer preferences, ranging from full-service stores offering repair facilities to self-service outlets, selling the product only with a minimum of personnel and the resulting saving is passed on to the consumer, the trend being to multi-pump operations with limited service.

In this manner his company seeks to monitor customer preferences and to meet them. Presently, Exxon-branded stores are widely advertised, usually accept credit cards, and provide a degree of repair facilities. On the other hand, its Alert stores, its private brand outlets, merely sell gasoline and motor oil for cash and provide no repairs.

Its dealer-operated stores fall into two categories. One is where Exxon owns or leases the stations and operates through lessee-dealers. The other category is where Exxon neither owns the real estate, nor the improvements. These are known as contract dealers. Exxon has approximately 356 of the former and 150 of the latter in Maryland. Additionally, there are 32 branded company operations here and 4 Alert stations in the state. In these outlets Exxon's management makes all marketing and operational decisions. The trend of the company-operated outlets has been declining in recent years.

One example of a company-operated facility is known as a car-care center which compete with mass-merchandisers, department and tire stores offering repairs. One of the features of such outlets is the USA Guarantee, which when issued will be honored at any Exxon car-care center anywhere in the nation. The investment in such centers can range up to one million dollars, and Exxon feels that in order to standardize performance to be able to issue the guarantee, these centers must be company-operated.

While Exxon now has 94% of its stations operated on a dealer basis, it has no plans to change this position. It has not terminated dealers for the sake of converting to company-operated outlets. However, it feels essential, at least for innovation and monitoring purposes, that some of its outlets be company-operated at all times so as to obtain first-hand experience in customer purchasing trends, to enhance dealer operations and to make a retail profit. It realized $700,000 from its Maryland retail operations in 1974.

Another important feature from Exxon's viewpoint is its ability to enter into a new market area with company-operated stations. Traditionally, until a brand name is established it is difficult to obtain lessees willing to risk their own capital on a product which may not gain acceptance. Florida was an example of this in 1962, where the company was compelled to



operate for approximately four years before a sufficient volume of sales was built up to enable lessees to earn a living wage. Such stations serve as training grounds for dealers and employees who in turn enter into their own operations. The ability of a company to operate stations provides continuity to a community of consumers in the event of the death of a dealer or his sudden leaving of the location. Exxon also operates an outlet on the Kennedy Expressway under contract with the Maryland Transportation Authority.

The witness was of the opinion that paragraphs B & C of the Act would preclude Exxon from operating any of its own retail stores in Maryland. It would be prevented from locally monitoring the gasoline and related retail trade here; from realizing a profit from its investments in the state; from building and operating car care centers here and issuing nationwide guarantees on repairs. It is unlikely that Exxon could obtain a fair return from the rental of its car-care centers, and in the case of the Alert stations the anti-trust provision of the federal regulations might preclude them from leasing to dealers.

As to paragraph F, he stated that fuel allocation nationwide is controlled by the federal government, and Exxon has been in full compliance with the formula with no distinction made between company-operated outlets and dealerships. He felt that paragraph F was in conflict with the federal regulations in that the federal acts contain provisions for hardships, redirectives, state set-aside programs and priorities in users, while the Maryland act is devoid of such provisions. Moreover he could not determine what a "period of shortage" is as used in the Maryland act, since it was not defined in the law.

On cross-examination, he stated the trend away from company-operated stations was economic, since the company had assumed a greater share of the costs of social obligations to its employees. When an outlet was shown to be unprofitable to Exxon for a term, it was

converted to a dealer, or "surplussed out." Maryland is a good market for Exxon, and that is one of the reasons the car-care centers were tested here. Alert stations do not sell Exxon gasoline, but petroleum products exchanged from B.P. (British Petroleum Oil, Inc.). Exxon allots a sum of money for loans to dealers going into service station dealers. There is no difference between cost of gasoline going to a company owned station and a dealer-lessee station. Exxon did not initiate the self-service concept. That was a product of the private brand market where it is still used. The witness also went into the method of allocation under the F.E.A.

Jack William Chandler, president of Kayo Oil Company since 1965, testified that he started with Kayo's predecessor, Kendall, in 1955 as an airplane pilot when Kendall had approximately 99 stations. The founder, Mr. Kendall, had been a jobber in petroleum. He foresaw the need for another method of marketing, and branched into low-price operation with five or six stations, usually selling directly from a railroad tank car stationed on a spur track. Such an operation was the origin of Spur, one of the recognized private-brand leaders.

Kayo never at any time had dealer stations, and found it an absolute necessity to control its own sales to the public. Kayo was purchased by Continental and now has 610 stations nationally, with 3000 employees. Of them, 14 are in Maryland. Its operations are as different from Exxon as it is possible to be.

A typical private-brand station is characterized by a large price sign. The brand name is minimized. The location is secondary, generally removed from prime sites with a limited space on its driveway. There are no service bays and no credit card facilities. Usually, there is one attendant with a moneychanger, and no more than three other attendants without special training, two attendants per shift. No road maps are offered, and no service or sales of automotive supplies. Such a



station is usually open sixteen to eighteen hours a day, seven days a week, including holidays. There is no advertising. The operation is managed by a supervisor for each seven or eight stations. His office is typically in a converted lube bay of a station taken over from another operation. There is no staff or secretarial help. Kayo's home office is a converted warehouse in Chattanooga. All of its managerial staff have risen through the ranks of its employees.

Historically, Kayo and other private-brand marketers have sold gasoline three to four cents below the prices offered by Exxon, Gulf, Shell, Texaco and the like — the major brands — because of the resulting low overhead of the private marketers. It is their only means of survival.

On being referred to paragraphs B & C of the act, the witness stated that had such a law been in effect when Kayo came to Maryland, it could not have entered this market, the reason being that in order to exist company-operated stations are mandatory. If the law were to go into effect, Kayo would be compelled to liquidate its holdings and leave the Maryland market.

On cross-examination Mr. Chandler admitted that he knew of no such decision on the part of Continental's board, but it was the decision of Kayo's directors. He was sure that Continental would not wish him to operate unprofitable stations. Kayo had tried a quasi-dealership operation in Chattanooga, and within three weeks it was a fiasco.

Portions of the depositions of Messrs. Charles King and J. D. Campbell, vice president of marketing and general manager of retail sales of B.P. Oil, Inc., respectively, were then introduced into evidence. Generally it was shown that B.P. decided to convert its dealership organization into a "gas and go" operation in the summer of 1973.

B.P. is a wholly-owned subsidiary of Standard Oil of Ohio. It had been Sinclair previously, operating stations from Maine to Florida, and two refineries.

After a merger with Arco, the U.S. Justice Department intervened, and a separation took place. British Petroleum and Sohio divided the properties and B.P. took over the Sinclair properties. To its dismay, it found the venture unprofitable. It sold off New York City, the Carolinas, Georgia and Florida properties and set out to become profitable from Virginia to Maine.

After spending some $50,000,000 in conventional stations in 1971 and 1972 it was noted that no improvement resulted. The company was encountering zoning and purchasing problems, and a number of failures. After losing $150,000,000 in four years in the conventional field, it was determined that drastic measures were indicated. It was decided to turn to "gas-and-go" as the result of a study of the situation.

The Baltimore area was no exception to the overall picture, although it could not be entirely segregated from the rest of the region. However, it was noted that only 10% of its gasoline sales are through gas-and-go outlets. The balance is still through independent marketers and jobbers. The experience of the independents, selling gasoline only, led them to believe a profit was thus to be made. Supply was then thought to be no problem. When it developed to constitute a problem, BP cut off many of its non-contract purchasers until the FEA allocation system was enforced.

BP determined in 1973 that 27 Baltimore locations would be suitable for gas-only locations. Since then the number has increased to approximately 35. Other BP dealers were offered various alternatives in event of displacement. They could become managers of gas-only facilities or could transfer to other locations at company expense. Those who decided to leave had their inventory and equipment purchased by B.P. Those who owned their own facility continued to receive supplies from the producer. Some 200 stations were sold to jobbers. Approximately 150 dealer stations remain.

Prices at gas-only stations are determined by competitive resale prices in the trading area, and can vary from



place to place depending upon competition prices, cost of operation, and the supply of gasoline available. The profitability of such a station varies in direct proportion to the volume of gasoline sold. The saving feature results from low overhead expense and a portion of the economy effected is passed to the consumer, generally from two to three cents per gallon below branded major prices which attracts the price-conscious customer. Prices at such stations approximate the price at outlets run by unbranded independents.

It is the theory of B.P.'s management that gas only stations would not operate as profitably under independent dealers who would be free to set their own working hours and days. Strict control of hours and prices enables such marketers to maximize volume sold. The concern that B.P.'s changes might cause branded majors to respond in a manner harmful to the market has not been justified.

Relying upon his experience as regional manager for Sohio in Toledo, Mr. King testified that in his opinion the company-operated stations of Sohio for a least 30 years have been a benefit to the consumer in maintaining lower prices, more convenient hours of operation, and setting higher standards of housekeeping. The price maintenance factor results when the company-operated station mark-up for regular gasoline was between seven and eight cents which coincided with prices in dealer-operated stations. With the advent of the oil embargo, dealers have tended to increase their mark up to ten cents while the company stations generally have not. Even so, the company-operated stations have not driven dealers out of business.

Theodore Levitt, Professor of Business Administration at Harvard University since 1965, testified as an expert for Exxon. He stated that he had reviewed the Act and in his opinion the application of paragraphs B & C would result in the reduction of competition in the market, an increase in price of gasoline, and reduction of services to the consumer, and a decrease in retail

offer, or the variety and mix of goods and services provided by a retailer to attract the consumer.

Attendant problems would be caused in that certain firms would be excluded. This would reduce competitive vigor, restrict new entries into the field and curtail innovation and experimentation. The result would be a price rise. Two hundred nine company-operated stations and one hundred forty-seven independent marketer stations would be affected. These perform an important function, creating price pressures and focus upon the price-conscious customer. Most of the independents cannot operate with dealers.

Innovation and experimentation have been illustrated in the retail field in the discount stores of the 1950's, and the supermarkets which created a demand which grew nationwide. The petroleum industry is subject to the same market demands and pressures where many enterpreneurs are anxious to take advantage of customers' change in taste.

Paragraphs B and C would constitute an attack on a consumer revolution, denying to producer-refiners an opportunity to experiment with economies to be effected. Artifical barriers to entry into the market are imposed and positive incentives to leave the state result. Thirty-two integrated companies are not in Maryland, and all would be precluded. Generally, when a marketer desires to enter a new territory, service stations must be company-operated until acceptance permits dealers to take over. Backward integration would be prohibited — one who is purely a marketer, not a producer or refiner, would have no incentive to expand into refining or producing, Rockefeller, Hess, Scott, and Blaustein are examples of this in the past. Mary Hudson is a present example. The result would decrease competition in those fields as well.

Innovation such as institutional car-care centers, self-service stations, would not be possible here. In his opinion B and C would constitute positive disincentives to invest in Maryland in the petroleum field because of



uncertainty of the provision and of the duration of the law and a shift in the normal flow of petroleum products to the state would occur.

On cross-examination he stated that he had been engaged in publishing articles for and about the oil industry and had written for the *National Petroleum News*. He had worked for Standard Oil of Indiana, Mobile, Exxon, Sinclair, Meadville and was presently being paid $1600 per day by Exxon.

He stated it was not unusual for there to be a wide range of prices among stations in close proximity and decision-making as to price decreases when company stations replace dealers. He defined predatory pricing as the illegal intent to destroy competition. The most efficient means of combatting it is to respond by offering price reductions to dealers in the affected areas. Should the law be upheld, the natural evolution in the sale of petroleum products will be slowed. There is no visible benefit to society to be served by this law nor any real or substantial relation to the public welfare. Twenty-four and eight-tenths of the Maryland market is with the price marketers. In the last ten years their market share has increased 78%. Continental and PMC would be affected by the provision of paragraph C.

Dr. Charles H. Berry, professor of Economics and Public Affairs of Princeton University, was produced as Gulf's expert witness. He stated that he had reviewed paragraphs B and C and concluded they had an adverse affect upon the interests of consumers. They would lessen competition in sales and possibly in refining and would alleviate downward pressures on pricing. Under the law, integration backward from seller to refiner to producer would be prohibited. Possible refining competition could be lost and the result could be the increase of petroleum price in the state.

One should be concerned when a class of competitor is eliminated, especially in the petroleum market. It is important to present the consumer with an array of

choice. Exclusion results in the loss of a type of supplier. He cited as an example the introduction of the Volkswagen. American manufacturers for years argued buyers wanted only large automobiles. When the Volkswagen was introduced, the other manufacturers lost sales, and a dramatic trend took place. The same economic factors exist in the petroleum field, and it is important that one should not be prohibited from experimenting. The consumer is the gainer from vigorous competition even though the manufacturer or competitor may get hurt. The super market had an enormous effect upon the corner grocery, but both survive and the consumer benefited. This process must be preserved.

He conceded that his theory is general and not specifically directed to the Maryland market, although he knew of no reason why his theory would not apply here. Vertical integration could be anti-competitive in two special situations, where there is a large monopolist selling to a sole buyer. A competitor coming in would have to enter both levels, or not at all, at great expense. The other is where exclusive franchises are given, such as Bell Telephone. It being regulated, if integrated backwards would be harder to supervise.

Theodore E. Ferguson, executive vice-president of P.M.C. testified that his company is an independent cut-rate marketer operating high volume outlets — 140 stations in seven states with twenty-one in Maryland. These outlets are without exception company-operated. Experimentation has shown that the company must control price to remain competitive. A dealer would not be able to sustain a break-even or loss for a sustained period. Its price differential is approximately two cents below the majors. P.M.C. has unsuccessfully tried car-care centers. Its stations aim for 24-hour operation, or at least an hour earlier and later than major-brand stations. It maintains strict standards of cleanliness and appearance in its stations. No mechanical work, washes, tires, or accessories are provided. Under present regulations it would be impossible to put a



dealer in its stations and require him to live up to its standards and hours, or to offer him a price he could live with.

During the OPEC embargo they went along with the President's proposals and closed only when it appeared immoral to stay open. During that period dealers found excuses to close earlier as soon as they sold their gallonage and to lay off employees. He has studied the effects of paragraphs B and C and if enforced PMC would be compelled to close its Scott stations immediately and take a loss. For example, one gas pump costs $1,200.00 and some stations have eight to twelve.

He further testified that Commonwealth operates at a loss at present. But for crude costs it would be a profitable operation. Their sales prices are established by an area survey to determine what would be a competitive price. He has had no reason to take the matter of closing before his directors, but they would have to decide whether or not to close its Baltimore terminal.

Dr. T. Marcus, Professor of Economics of Rutgers University, presented by Shell, stated that at the request of the Attorney General of New Jersey he testified before the New Jersey legislature, which was considering a similar statute to Chapter 854. He was paid $6.00 for his deposition. His inquiry was to see if the public would be better off five to eight years from now in the event of enforcement.

He also stressed the undesirable features of the lessening of competition. At present, competition in the gasoline marketing retailing is intense. Substitute brands are fairly close, and price information to the consumer is readily available by driving and watching signs. The consumer must and is able to act quickly. High competition affords lower prices, better variety, and innovation.

The effect of paragraph C would be to increase prices with the elimination of producer-refiners and the price marketers affected. Forward integration is precluded.

The potential entry into competition is reduced, which in turn will affect variety and innovation which is the product of research and development. With the elimination of major marketers the incentive to gamble in research necessarily is curtailed when the opportunity to recover expenses is removed.

Dealer-operations have a distinct neighborhood advantage where clientele is local. In Shell's case, company-operated stations are under 5% of the total. Since Commonwealth is operating at a loss, it may try doing something innovative to turn a profit. It should have the opportunity to do so. The act seeks to restructure a whole industry. It would have a very far-reaching effect which may result in freezing out an enormous industry factor which could be irretrievable were the law eventually to be repealed. Gulf, for example, has already curtailed expansion plans here. The bill offers no public benefit. Its effect is entirely undesirable.

He stated he was being compensated at the rate of $450 an eight-hour day in this case. It occupied twenty-five to thirty days. During his preparation he wrote no report, but in Houston, Texas at Shell's experimental center he observed self-repair stations, space in stations being rented for repairs, facilities for changing one's own oil, and stations where groceries, film and other items were offered for sale. Some of these innovations might not be attractive to dealers, nor would dealers be apt to experiment so widely. He did not interpret the New Jersey bill to require divestiture.

He pointed out that in the 1930's Shell was operating nearly all its own stations. He stressed the importance of many decision makers.

Mr. Marcus questioned the necessity of such drastic action as to Maryland in the petroleum industry, only emphasizing that no other segment of industry was singled out. It was not attempted in the grocery industry with the advent of super markets. Divestiture



is generally relegated to firms found to have violated anti-trust laws.

Charles J. Lluellen, group vice-president of Ashland, testified that his company, although an independent refiner, which controls less than 30% of the crude it refines, is in retailing in Maryland as an independent private-brand marketer, operating at present at a price disadvantage. Prior to the OPEC embargo, its operations were profitable. At the end of 1972 its crude supply was drastically reduced so that its refinery runs reduced with attendant effect on branded and unbranded marketing.

Its retailing practices are similar to Kayo and Scott. Sixty-percent of its gasoline is sold to wholesale non-contract customers and to assure efficiency it must maintain a nucleus of controlled outlets, seventeen being in Maryland. Since it must pay more for its crude than the major producer-refiners, its costs ratio is greater.

As the result of Chapter 854 Ashland has had to consider attempting to dispose of its stations in Maryland and sell its gas in some other place. It has tried, but failed in the dealer operation area. Among its wholesale customers in Maryland are Sears Roebuck and Penny's. The law could jeopardize their position. It exchanges gasoline with Continental and sells Continental's product. The exchange is now in balance, but would be out of balance were the law to be enforced. If forced to withdraw, it would be placed at a great disadvantage not only with its refinery runs, but would face losses in disposing of its holdings.

Under cross-examination he stated that *Fortune* Magazine place Ashland's profit increase within the first one hundred companies for 1973-1974. Its crude supplies are 50,000 barrels world-wide and 30,000 locally. The act would not affect its crude supply, but can affect refinery runs. It would be impossible to operate as before if the law were to survive. Nor could

he conceive of any one purchaser taking the entire output.

In 1953 to 1970 Ashland tried to enter the Michigan market, but was unsuccessful. It invested over $1,000,000 and had thirty-five stations. When it failed to capture more than 0.25% of the market it took its losses and left.

There were no written contracts with its customers when the shortage came. All were told that they would be placed on an allocation program, and told if they left them might not thereafter be supplied. They supplied their own stations, but less than before. They closed the least-efficient operations. All who stopped purchasing from them did so voluntarily.

One alternative if the law is upheld is to withdraw the gasoline from Maryland and run it through other states. It can now sell at retail as much as it can get.

Mary Hudson Vandergrift testified that her business name is Hudson Oil Co. This operates in 36 states as purely a marketing company with 315 outlets. It has no production or refinery. Her stations are company-owned and operated and the product is sold at two to three cents below the majors' price. She competes with Payless, BiLo, and Red Head brands. Ashland supplies her operations. Price control is paramount, and company control is required for the same reasons related by the other independents. She tried dealers for six months during World War II and lost control. Dealers would not follow order, and stations were allowed to become dirty.

Since thirty-five percent of her stations were closed during the crisis, she has determined to acquire a refinery. This should assure a supply over which she has control. This is known as backward integration. It is expensive, but will enable her to improve services and increase the number of customers.

With Chapter 854 in effect, she will have to dispose of Maryland stations although she has been here for twenty years. She doesn't need a law to protect her from Ashland. She can meet the competition.



She has no arrangements for crude from Ashland. It will come from off-shore and domestic wells. Her experiment during the war with dealers involved thirty stations out of one hundred twenty. She hasn't tried it since.

John H. Lichtblau, a witness produced on behalf of Ashland, is an economic researcher and executive director of Petroleum Industry Research Foundation. He has testified before the U.S. Senate on a number of occasions. He was familiar with the Emergency Petroleum Allocation Act and Chapter 854.

Ashland is considered an independent refiner which is a refiner whose supplies are low. It cannot compete with the major companies nor advertise on a national scale. It is a price-marketer and its gasoline cost depends directly on the price of crude oil. The means of competition is through discounting which necessitates high volume sales and low overhead. This is as true for refineries as for retail outlets. Therefore, for efficiency a continuous flow of refined products is essential. Since the wholesale market is extremely volatile, the independent refinery requires retail outlets to keep its output constant. A reduction in the number of stations in the state would mean the remaining ones would sell at a higher price, if the private-brand marketers were removed from competition. There is no chance of Ashland getting into the dealer market without all the expense attendant to becoming a recognized brand, and as such would be impractical.

The preamble to the Federal Petroleum Act recites that the Congress' design was to protect the independent marketers and refiners.

On cross-examination he conceded that in the event of the withdrawal of Ashland and others from the Maryland market there was nothing to prevent operators such as Mrs. Hudson from taking over some outlets and continuing to sell at discount. However, since some 180 sites would be affected, it was unlikely that all could or would be utilized, and that a net loss of retail

outlets would take place, although Sears and Penny's could be supplied by others.

In his opinion the situation which caused the shortage was totally beyond the control of Maryland, and had nothing to do with any condition within the state.

On the part of the defendants, Mr. John Coleman, Chief of the Gas Tax Division of the Comptroller's office, testified that his department is the only department charged with gas tax problems, but he was unable to identify the number of sales in the state at any given time. Only one state, Georgia, has this ability. In June of 1973 the Comptroller received a letter from the Governor making inquiry concerning gasoline station operations during the period of "real or contrived" shortage.

In response, his department sent questionnaires to 4,055 service station dealers requesting various information for the calendar years 1971, 1972 and to June 13, 1973. Thirty-four percent replied. Generally, the survey indicated that of the major oil Company-owned leased-to dealer stations allocations for the period ranged from 70% to 106% of prior purchase. Of 772 responses 171 outlets were unrestricted. One hundred fifty-eight limited sales to customers and 93,300 hours were lost. Wholesale increases ranged from 0.9 to 5.5 cents per gallon and pump prices increased 0.8 to 6.6 cents. Temporary discounts of 0.5 to 7 cents were withdrawn. Before the crisis, dealers were encouraged to maintain longer hours, including Sunday openings. Volume was stimulated through gifts and promotions. Self-service had been introduced.

In the case of privately owned major-brand stations, allocations ranged from 0% to 150%. Of 503 dealers reporting 378 were forced to close or limit sales. Voluntary allowances from 1 to 1½ cents were withdrawn and wholesale prices rose 5 to 8 cents while retail prices rose 0.5 to 10 cents.



**The Tax Division assumed that leases were cancelled to channel volume through controlled outlets for greater profit. B.P. drew the greatest number of complaints, but the reason, as previous, was an assumption.**

**Of unbranded outlets numbering eighty, thirteen were unrestricted and sixty-seven allocated 49% to 90% of the allotment the previous year. Here, 24,000 hours were lost with 70 limiting sales. Thirty-nine were forced to close. Wholesale prices rose from 0.5 to 9.75 per gallon and pump prices 0.5 to 10 cents. Price rises rendered this category of stations unable to compete with branded or better facilities in the area. Foreign supplies were not protected by Federal guide lines.**

**Of fifty-two company operated outlets reporting, only one reported allocation. Pump prices increased from one to six cents. Crown Central Petroleum and Alert failed to respond, but it was the conclusion of the office that company operated outlets were unaffected while independent and unbranded stores were most affected.**

**Major-branded dealers seized upon the opportunity to reduce hours while selling the same volume of fuel as in the past. The conclusion was that there was a trend to restrict and eliminate lower volume outlets as well as those who were owners or who leased back. The low response was taken to mean satisfaction with present arrangements or fear of reprisal by majors.**

**His office then conducted a spot audit of Exxon for three months in 1973 and 1974. Using fifteen company stations and fifteen leased stations it was determined that Exxon had, in fact, fairly allocated between the two groups. Save in one instance in allocating to farmers, Getty had properly allocated also. When the mistake was brought to the latter's attention, it was immediately rectified.**

**On the strength of the above, the Comptroller requested Coleman draft a bill. The draft was sent to the Governor, who in turn sent it to the Legislature. Bills were introduced simultaneously in the House and Senate, known as H.B. 98 and SB 465, respectively. Mr.**

Goldstein testified before the legislative committees and copies of the analysis of the reports were presented.

Coleman proceeded then to give his definition of the terms used in the bill as enacted. He stated that the tax division has promulgated an orderly manner of divestiture. No other rules or guidelines have been formulated pending the outcome of this litigation. Should it be upheld, the majors would be requested to participate in hearings on formulating regulations.

Under cross-examination he stated that in drafting the bill he consulted no economist and made no investigation on the economic impact of the proposed law, even though based on the evidence he had, no majors were misallocating for the audited period. So far as he was concerned there was no relationship between the survey and paragraphs B and C of Chapter 465. When questioned concerning the application of the act to the various entities which it would affect, he stated in his opinion the act could not be amended to take in every facet of the gasoline industry. He defined a producer-refiner as any person producing, refining, compounding, blending motor fuel in this state, as defined in § 157A (7) of Article 56. The definition of 157A would apply to 157E. The latter phrase is further defined in § 135(h). Any one blending is a compounder. To him a manufacturer is a producer. Anyone blending would be considered a manufacturer as in the case of Continental exchanging with Ashland. No plaintiff in the case produces in Maryland.

Wholesalers had been included in the draft. There was no reason he knew of to exclude them. He was of the opinion that Ashland had a crude shortage and was unable to furnish the usual supply to its customers.

On questioning by the Court, the witness stated he personally felt it was unnecessary to draft the act. He presented the report to Goldstein and the latter said to draft it. He does draft bills which he feels are necessary and they are checked by the Attorney General's Office.



Arthur E. Price, Chief of Motor Fuel Inspection for the State was a former Citgo Regional Marketing Manager. He testified that there was no follow-up to the original questionnaire because there wasn't time. The target date was the end of August. He obtained other information, but did not feel it was his division's obligation to reach a conclusion as to whether shortage was real or contrived. In the survey of the service stations or major oil company survey nothing leads him to the conclusion that there is anything present which is detrimental to the public welfare.

Dr. James M. Patterson, produced as a defense witness, is a Professor of Marketing of Indiana State University and teaches marketing strategy. He has authored two books, *Competition Limited,* in 1962 and *Highway Robbery,* in 1974. He has co-authored texts on marketing. He also has testified before the U.S. Senate. He has studied literature on the petroleum marketing practices in Maryland. In his opinion, competition is enhanced by variety, innovation, new products, price, and convenience. He is familiar with paragraphs B and C of the act. He thinks those paragraphs will preserve and enhance "air tight" competition and increase benefits to the public. In the industry, he finds as between majors there is non-price competition. Sale force is between types of marketers. The private brands find the principal weapon is price. Between majors price is self-defeating. If the law is effected, probably some marketers would leave the state, but stations would be sold and non-integrated marketers would probably take over. Innovative techniques would to some extent be handicapped, but much important innovation seems to come from outside. Self-service was used by non-integrated marketers.

Retail prices in the state will be determined by the cost of crude affected by the OPEC nations and not by Maryland and the U.S. Certain actors will not be able to enter the market, but the problem is not serious. Divestiture, although another method might have been

utilized, is not an unrealistic approach to the problem. There are advantages to the public to permit company-owned and operated stations as related by plaintiffs' witnesses. However, the huge windfall profits of the majors and refiner marketers from the rise in crude prices would be focused upon the price marketers. Without the law the interprice competition will be lessened. He thought the government should maintain its supervision.

On cross-examination he stated he had done more research since his deposition in August. He now has a better idea of the competitors and the geography of the state. He can't now identify the price-setters and the price-takers in this artificial market in Maryland. *Competition Limited* was the result of articles he had read and conversations conducted with members of SIGMA — Society of Independent Gas Marketers. He surveyed the St. Louis market. SIGMA members mostly own large chains of salary-operated private brand operators. It helped subsidize the book. *Highway Robbery* is partially a condensation of the first. It was subsidized by the Council of Independent Gasoline Marketers. He received $6000 for it. CIGM members have been members of SIGMA — he said they were a more radical group than SIGMA. They advocated that buy-outs of independents be stopped.

If there were no discounters to bring the price down in Maryland, there would be a problem in competition here.

The competitive behavior of the seller is the effective test, and not the ownership of the outlet. Company-owned stations are better able to deal with price-cutters. It is not good economics for the government to shield one competitor from another. Shielding is acceptable only if competition is preserved, but predatory competition is now illegal. If company operations are used to check discounters, it would be anti-competitive, otherwise, it would be pro-competition.



Before the FEA went into effect, dealer margin was seven cents. Under FEA dealer margins were permitted to rise to eleven cents. He thought FEA was coerced by an unarmed rebellion of retail dealers. The rise came as the dealers threatened to close their stations. This came in the face of reduced dealer cost. As such, it was not a competitive market. It would be pro-competitive for companies to come in and operate stations at the old margin. The public would certainly benefit in this event. He thinks the dealers support the present law because they see a decline in the opportunities for dealers in the competitive market. They see margin competition. One of the effects of the law would be to protect the branded dealers' margin and this also is not in the public interest. Government should not shield any group from non-predatory competition. The proper role of government is not being performed in preserving the vigor of competitive process when it prohibits fair competition between company operations with salaried employees and any other segment of the industry. As to this instance, the proper role of government is not being performed under paragraphs B and C for the act. He has never made a cost benefit analysis of the statute's effect on Maryland motorists. He knows of no price-marketer who will come into Maryland as the result of this law. The withdrawal from unprofitable operations and accelerated closing of low-volume stations are good things. There is a surplus of gasoline at present.

He was troubled over Chapter 854 with respect to refiner-marketers like Ashland. It did not make economic sense. Ashland, as a crude-deficient refiner, markets substantially to independent marketers and price-makers. It is extremely pro-competitive. They are essential as suppliers. He supported federal legislation to get crude to the independent refiner-marketers. They were victims of the embargo and disadvantaged with respect to the majors. The crude-deficient refiners are safety valves. He agreed that Ashland in Maryland could not maintain dealer stations, and would have to withdraw.

His concern would be with aggressive rather than passive price setting. Ashland tends to meet price. It should not be removed from the state market. The legislation would be of negative benefit if its effect would eliminate the price-followers. He would have revised the definitions had he drafted the law.

With regard to Hudson, she is sensible to integrate. A new refinery would be pro-competitive and an improvement. She would be a crude-deficient refiner-marketer. A law that would require her to cease to sell in Maryland is not consistent with sound economic principles. If she were to divest it would mean a net loss to her and the public unless someone else took over her stations. The law has negative aspects with respect to Commonwealth, Coastal States and Hudson also, but if they were to become too large then the effect would be otherwise.

## THE LAW

The years 1972 and 1973 were truly "times to try men's souls." The petroleum shortage touched the life of every citizen, and especially the motoring public and those whose livelihoods were derived from allied industry. Rumors abounded as to cause and effect, and there were even those in the highest echelons of national government who darkly warned of war, if necessary, to obtain the supplies of crude oil to preserve the American way of life. It is little wonder, therefore, that the Executive Department of this State would make inquiry as to whether or not the shortage was real or contrived, and that the Legislature undertook to protect its electorate from what it perceived to be the source of the contrived evil existing within its boundaries. The result was Chapter 854 of the Acts of 1974 and the subsequent amendment, Chapter 608 of 1975.

Because of the drastic economic impact of this law as amended upon the companies affected, the plaintiffs, as well might be expected, have appeared and attempted to assert every possible constitutional impediment to the



implementation of the law. It is the unenviable task of the undersigned to undertake the first step toward the determination of whether or not the Plaintiffs' position is legally sound.

The Plaintiffs' collective position is that (a) it conflicts with the Robinson-Patman Act, 15 U.S.C. 13; (b) it is preempted by the Federal Emergency Petroleum Allocation Act of 1973 and the Federal Energy Administration Act of 1974; (c) the plaintiffs are not subject to the provisions of the act; (d) it burdens interstate commerce; (e) it is unconstitutionally vague; (f) the act constitutes an unlawful exercise of the police power of the State and denies the plaintiffs due process of law; (g) the act is discriminatory and constitutes a denial of equal protection of law; (h) the act provides an unconstitutional taking; and (i) it constitutes an unlawful delegation of authority.

These contentions will be dealt with seriatim.

## CONFLICTS WITH THE ROBINSON-PATMAN ACT

The court has already dealt with this contention, and has granted plaintiffs' motion for partial summary judgment with respect to paragraph D of the act for the reasons previously expressed in open court as supplemented by the subsequent order. It will not be discussed further.

## PREEMPTION BY THE FEDERAL EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, 15 USC § 751, ET SEQ. AND THE FEDERAL ENERGY ADMINISTRATION ACT OF 1974, 15 USC § 761.

The above acts, so long as they remain viable by their own terms, preempt all other laws. Section 755 (b) of Article 15 USCA states:

> "The regulation under section 753 (mandatory allocation) of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual

fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order."

That such an expression of legislative intent is binding upon the State was established as early as *McCulloch v. Maryland,* (1819), 17 U.S. 416, while *Gibbons v. Ogden,* 9 Wheat 1, requires that regulation of phases of national commerce demand that regulation, if any be prescribed by a single authority. Therefore, the motion for partial summary judgment as to paragraph F must be granted.

## THE PLAINTIFFS ARE NOT SUBJECT TO THE PROVISIONS OF THE ACT

This contention is developed through an ingenious theory, to wit: the term "producers or refiners" as used in the act is synonymous with the term "manufacturer and refiner" according to John Coleman's definition. The term "manufacturer and refiner" is expressly defined in the motor fuel inspection law, Annotated Code of Maryland, Art. 56, § 157A(7), et seq., as:

> ". . . any person, firm or corporation engaged in producing, blending or compounding motor vehicle fuels in this State."

Plaintiffs do not produce, blend (except in the case of Shell and Gulf which they maintain is *de minimus*), or compound motor vehicle fuels within the territorial boundaries of the State of Maryland, and thus are not affected by the Act. In order to accept this argument, this court would be compelled to find that the Legislature enacted laws which it intended to be of no effect and all its labor with regard to the law was an exercise in futility. Such a finding would be contrary to reason and common sense, and would produce bizarre and preposterous results. However, there is no need for the court to reach this issue or the considerations demanded by *Slate v. Zitomer,* 275 Md. 534 (1975) regarding it, as the court believes the ultimate disposition of the case is determined by the police power issue.



The motion for partial summary judgment based upon this reason is therefore denied.

## THE BURDENS TO INTERSTATE COMMERCE

This member of the court remains unconvinced that the act, if otherwise valid, would unduly burden interstate commerce. In the recent case of *Merrill Lynch, Pierce, Fenner and Smith v. Ware,* (1973), 414 U.S. 117, 38 L. Ed. 2d 348, the appellant sought to claim that California's statutory policy of protecting its wage earners unduly burdened interstate commerce where appellant was admittedly engaged in interstate commerce, and Ware's employment by appellant was conditioned upon his approval by the New York Stock Exchange and subject to its regulations. A unanimous court held that the national government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation.

In this case the flow of petroleum products into the State is not sought to be regulated or curtailed. The statute seeks merely to impose more stringent control over its sale after it enters its boundaries. The law would merely assert a new ramification with regard to an industry which the State has already regulated, and the industry, up to now, has taken scant, if any, measures to assert this objection.

## VAGUENESS

This court agrees that the statute is vague. It gives a lick-and-promise appearance of a measure having been passed with a minimum of study in order to placate a vocal advocacy. For example, paragraph F apparently applies only during periods of shortage. "Periods of shortage" is an undefined phrase, and there is no hint as to its meaning. Shortage means deficit, but it is unclear whether a local shortage or a state-wide shortage would trigger the provisions of the paragraph, nor is it clear under what circumstances the period

would be declared, or by whom. To the same effect are the undefined expressions, "voluntary allowances," and "uniformly."

The language contained in *Connally v. General Construction Company,* 269 U.S. 385, 391, seems particularly applicable:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law."

The statute appears deficient in this regard, since it would seem "that men of common intelligence must necessarily guess at its meaning and differ as to its application," a violation of the first essential of due process. *Giant of Maryland v. States Attorney,* 67 Md. 501, 515. *Lashley v. State,* 10 Md. App. 136. See also *Loughran Co. v. Tobacco Co.,* 178 Md. 38 where an act was held unconstitutional which attempted to use "existing market conditions" to justify a price of a commodity.

However, such technical assertions, even if upheld, could and very well might result in reenactment of the law, with a few housekeeping changes aimed at meeting the lack of definitions and the clearing up of ambiguities. However, in the opinion of this member of the court the major infirmity of the legislation would still remain, based upon an unlawful exercise of the police power of the state. It is discriminatory, denies equal protection of the law and constitutes an unconstitutional taking.

## DELEGATION OF LEGISLATIVE POWER

The rule pronounced in *Pressman v. Barnes,* 209 Md. 544, 555 as recently reviewed in *Montgomery County v. Walsh,* 274 Md. 502 is as follows:

> "Generally, a statute or ordinance vesting discretion in administrative officials without fixing any standards for their guidance is an unconstitutional delegation of legislative power.
>
> But we also hold, as a qualification of the general rule, that where the discretion to be exercised relates to police regulations for the protection of public morals, health, safety, or general welfare, and it is impracticable to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will, legislation delegating such discretion without such restrictions may be valid. (citations omitted) It is recognized that it would not always be possible for Legislature or City Council to deal directly with the multitude of details in the complex situations upon which it operates. *Comptroller of Treasury v. M. E. Rockhill, Inc.,* 205 Md. 226, 232, 107 A.2d 93. The modern tendency of the courts is toward greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increases."



Mr. Coleman testified it would be impossible to tailor guidelines to fit every conceivable aspect of so intricate an industry. The validity *vel non* of the delegation of powers would therefore seem to depend upon whether or not the measure were properly within the exercise of the State's police powers.

## POLICE POWERS

While recognizing the universal concept that all acts of the Legislature must be presumed to be valid, and one attacking the constitutionality of a statute has the burden of affirmatively and clearly establishing its invalidity, *Salisbury Beauty Schools v. State Board,* 268 Md. 32; *Wilson v. Board of Supervisors of Elections,* 273 Md. 296, the court is also required to place a strict construction upon the statute, since it is in derogation of the common law right of an individual to dispose of his property or his services at such a price upon which he and a purchaser may agree. *Loughran Co., supra.*

There can be no question that the sale of gasoline and other petroleum products is a valuable and lawful right. Were it not so, neither the law nor this litigation would ever have been instituted.

> "Freedom of contract is not absolute. It is subject to reasonable legislative regulation in the interest of public health, safety and morals, and in a sense not resting merely on expediency, the public welfare. But restraint upon such freedom must not be arbitrary or unreasonable. Freedom is the general rule and restraint the exception." *Constitutional Limitations,* Cooley, Vol. 2 (8th Ed.) 1236.
>
> "The guaranty of due process simply demands that the law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained. Within the above limitations, a state is free to adopt and enforce whatever economic policy may reasonably be deemed to promote public welfare, whether by promoting free competition by laws aimed at monopolies, or by curbing harmful competition by fixing minimum prices." *Nebbia v. People of New York,* 291 U.S. 502, 78 L. Ed.

In a recent line of cases the Court of Appeals has established a standard for review of economic legislation which is more restrictive than the test applied in recent years by the Supreme Court of the United States.

As stated by the court in *Aero Motors v. Adm'r. M.V.A.,* 274 Md. 567, 587 (1975):

> "Although Art. 23 of the Maryland Declaration of Rights has long 'been equated' with the 'due process' clause of the Fourteenth Amendment by judicial construction and application, the two provisions are not synonymous. The decisions of the Supreme Court appear to uphold the validity of a regulation as within the exercise of the 'police power,' and hence not a denial of 'due process' if the statutory enactment is based on any reasonable consideration affecting the public welfare. See *Nebbia v. New York, supra; Williamson v. Lee Optical Co.,* 348 U.S. 483, 488 (1955)."



See also *Bowie Inn v. City of Bowie,* 274 Md. 230 (1975) at page 253 (Dissenting Opinion, J. O'Donnell).

In *Salisbury Beauty Schools, supra; Maryland St. Bd. of Examiners v. Kuhn,* 270 Md. 496 (1973); *Maryland Bd. of Pharmacy v. Sav-A-Lot,* 270 Md. 103 (1973); and *Aero Motors v. Adm'r. M.V.A., supra,* Maryland has followed the "traditional" test formulated in *Lawton v. Steele,* 152 U.S. 133, 137 (1894) and followed in *Goldblatt v. Hempstead,* 369 U.S. 590, 594-95 (1962), requiring that a "real and substantial relationship" to the object sought to be attained by the statutory regulation be shown. The federal-state dichotomy was clearly pointed out in *Sav-A-Lot, supra.*

The test enunciated in *Lawton v. Steele, supra,* is that:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In restating the standard of reasonableness in *Goldblatt v. Hempstead, supra,* the Supreme Court went on to state:

> "The ordinance in question was passed as a safety measure and the town is attempting to uphold it on that basis. To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which

> appellants will suffer from the imposition of the ordinance." 369 U.S. at 595.

The defendants maintain that this is no longer the test in Maryland. They contend that the plaintiffs are not entitled to a declaration of invalidity on due process grounds unless they can meet the heavy burden at trial of demonstrating that there is absolutely no rational relationship between the objects of the act and the means employed by the Legislature to attain those objects.

Our Court of Appeals has only once departed from the *Lawton v. Steele* test in their recent opinions, that being in *Bowie Inn v. City of Bowie,* 274 Md. 230 (1975) in which the majority did so, as noted by Judge O'Donnell in his dissenting opinion, by ". . . conspicuously omitting from the criterion the requirement that the means selected must have a real and substantial relation to the object sought to be attained," and thus ". . . departed from the 'traditional test' which our cases have adopted."

Defendants place great reliance upon *Bowie, supra.* They assert that *Bowie,* taken in conjunction with the decisions in *Ferguson v. Skrupa,* 372 U.S. 726, 83 S. Ct. 1028 (1963), *North Dakota St. Bd. of Pharm. v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 94 S. Ct. 407 (1973), and *Wall v. American Optometric Association, Inc.,* 379 F. Supp. 175 (N.D. Ga., 1974), *affirmed* 419 U.S. 888, 95 S. Ct. 166 (1974), serves to dispel the requirements of the *Lawton v. Steele* test and place in its stead the "rational basis" test.

Prior to *Bowie* in *Sav-A-Lot,* the Court of Appeals noted:

> ". . . That whatever may be the current direction taken by the Supreme Court in the area of economic regulation, as distinguished from the protection of fundamental rights, Maryland . . . adhere(s) to the more traditional test formulated by the Supreme Court and enunciated in *Lawton v. Steele* . . ."



If, indeed, any erosion was visited upon this well-established doctrine by *Bowie,* the hiatus which it created was of short duration, for within two months of the date on which *Bowie* was decided, the Court delivered its opinion in *Aero Motors v. Adm'r. M.V.A., supra,* which clearly indicates that the "traditional" test formulated in *Lawton v. Steele* is still the law in Maryland.

The Court of Appeals has invalidated, on constitutional grounds, a state law prohibiting anyone from selling anything which uses a gift as an inducement of sale, *Long v. State,* 74 Md. 565 (1891); a statute prohibiting railroad and mining corporations from selling goods to company employees; *Luman v. Hitchens Bros. Co.,* 90 Md. 14 (1899); a law regulating the valuation of trading stamps; *State v. Caspare,* 115 Md. 7; a law requiring all coal mining corporations to pay their employees on a semi-monthly basis; *State v. Potomac Valley Coal Co.,* 116 Md. 380 (1911); a law providing for the licensing and regulation of paper-hangers in Baltimore City; *Dasch v. Jackson,* 170 Md. 251 (1936); a statute requiring ten years of educational preparation in order to obtain a barbering license; *Schneider v. Duer,* 170 Md. 326 (1936); a state law prohibiting the advertising of prescription drugs; *Md. Board of Pharmacy v. Sav-a-Lot, supra;* and a state law restricting cosmetologists from cutting or shampooing male hair; *Md. State Board of Barber Ex. v. Kuhn, supra.*

The Attorney General in his opening statement maintained that there was an evil at hand identified by the Legislature. Presumably, he referred to a contrived shortage of petroleum and heating oils, since this was the topic of the Governor's inquiry. He stated that his witnesses would show that divestiture would restore and maintain free competition; that the law was aimed at preserving competition and not to protect any identifiable group; that company-owned and operated stations produced detrimental effects upon the retail marketing of petroleum products.

The evidence did not support these statements. The court finds from all the evidence produced before it that the shortage was actual and beyond the control of the legislature of the State or of the Congress of the United States and was directly related to the OPEC embargo. Defendants' witness, Dr. Patterson, admitted that even he was of the opinion that the scope of the law was overly broad. Apart from restraining free competition, it was shown that divestiture would be harmful to competition in the industry, and would primarily serve to protect the independent dealers rather than the public at large. There was no proven detrimental effect upon the retail market caused by company-owned-and operated stations which could not be curbed by federal and state anti-trust laws.

In applying the evidence in this case to the first test of *Lawton* — that the interest of the public generally must be served as distinguished from those of a particular class, or stated otherwise, that a real and substantial relationship to the object sought to be attained must be shown — the court specifically finds that among the experts who testified there was unanimous agreement that in precluding the independent crude-deficient refiners from selling at retail in Maryland, a powerful source of price competition with the branded dealers would be eliminated, the effect of which would be anti-consumer, and that any law which had such an effect would not be in the interest of the public at large.

> "It follows from these facts that it would be in the best interests of the public — to enable purchasing at the lowest available prices."
>
> *Sav-a-Lot, supra,* at p. 121.

The court also finds from the preponderance of the evidence that the law will preclude all of some thirty-two producer-refiners not now in the State from ever entering the competitive market in Maryland, and vertical integration will be prohibited. Neither effect is



in the public interest since competition is essentially for consumer benefit.

Noteworthy also is the fact that the original draft of the law included wholesalers in the prohibition against retail selling. The final draft of the law eliminated wholesalers, for the sole reason, according to Mr. Coleman, that the wholesalers requested their elimination from the act. There was no evidence whatsoever relative to why wholesalers should have been included initially, nor how the general public benefited from their exemption.

In all the more than one hundred eighty-five pounds of pleadings, motions, briefs, exhibits and depositions before this court, there is no concrete evidence that the act was justified as to the classes of operators singled out to be affected in order to promote the general welfare of the citizens of the State. Rather, it is apparent that the entire bill is designed to benefit one class of merchants to the detriment of another. *Regal Oil Co. v. State,* 10 A.2d 495 (N.J. 1939).

Evidence showed that of the refiners-producers complained of, B.P. was mentioned by most as the greatest offender. In justification for its actions there was shown that B.P. has lost more than $150,000,000 in its recent operations in this area. There is no known legal obligation which would require a corporation or an individual in our capitalistic society to continue to lose money in order to preserve the business of those who directly depend upon it.

Both defense witnesses from the Gasoline Tax Division conceded that from their statistics there was no reason they could determine which would justify the act. After the FEA allotment requirements went into effect, their audit of twenty-six Exxon stations disclosed only fair allocation among the dealer- and company-operated outlets.

The court finds that as in *Sav-a-Lot, supra,* apart from there not being demonstrated a real and substantial relation to the object sought to be attained by the

means selected, the evidence presented before it indicates that the statute is inversely related to the public welfare.

Turning to Lawton's other tests — that the means employed must be reasonable, not unduly oppressive or beyond the necessities of the case — it will be observed that the means of carrying the law into effect as to the producer-refiners would have necessitated that on or before July 5, 1975 some 229 outlets amounting in value to over $12,800,000.00 would have to have been divested, unless the Comptroller were to be convinced of the merits of extending the divestiture period. There was no suggested way in which those affected could obtain a fair market price in arms-length transactions when the potential purchasers were well aware of the exigencies of the occasion. The result would amount to forced sales or leases on a buyers' market, with scant chance of obtaining a fair return on investments made in Maryland in good faith by the entities affected.

This court has been referred to no situation short of the Prohibition Era where any group of retailers engaged in lawful mercantile activity have been compelled to divest without at least an appreciable period designed to afford amortization of the assets affected by the order. It finds the means unduly oppressive and beyond the necessities of the case.

As previously mentioned, the reasons for focusing upon the petroleum industry were obvious, but similar legislative attempts to restrict competition in marketing in this and other industries have generally been held to be unconstitutional. A New Jersey statute prohibiting hawking and peddling was stricken in *N.J. Good Humor v. Board,* 11 A.2d 113, 117; a Kansas statute prohibiting manufacturers, distributors, or sellers of gas from selling gas appliances was likewise ruled an unlawful exercise of police power in *Capital G & E Co. v. Boynton,* 22 P.2d 958; a Florida statute was nullified in *Exxon Corp. v. Conner,* Cases 74-1449, 74-1577, 74-1772, Circuit Court of the Second Judicial Circuit in and



for Leon County, Florida where Florida's equivalent to Chapter 854 was also nullified. That court held that a state cannot arbitrarily interfere in private businesses or impose unreasonable and unnecessary restrictions upon them under the guise of protecting the public. Discriminatory legislation damaging to one segment of a class of business and beneficial to another is not a valid exercise of police power. *Eskind v. City of Vero Beach,* 159 A.2d 209 (Fla. 1963).

*Amici* in their brief have devoted seven and one-half pages to the holding in *Paramount Pictures v. Langer,* 23 F.S. 890 (1938), wherein the State of North Dakota had prohibited motion picture producers from owning theatres in that state. That case was reversed by the Supreme Court in 306 U.S. 619, 83 L. Ed. 1025 on the ground of mootness. However, this Court notes that the District Court stated in its opinion:

> ". . . but there is evidence in the record here which justifies an inference of suppression of local competition in states other than North Dakota by producers having affiliated theatres; and the evidence also discloses the existence of the power and in temptation of such producers to engage in practices promotive of monopoly and restraint of trade."

Likewise, in *Crescent Oil Co. v. Mississippi,* 257 U.S. 129 (1921) there was evidence that corporations operating cotton gins would depress the price of ginning, regardless of cost, until local competition was overwhelmed, whereupon the costs were raised, while unfair prices were paid for seed. Such monopolistic practices were held to be clearly subject to the power of the legislature.

If such evidence did exist before the legislature, it was not presented to the court. Hence, the examples cited as well as laws regarding common carriers and closely regulated industries are inapposite.

DENIAL OF EQUAL PROTECTION
UNCONSTITUTIONAL TAKING
UNLAWFUL DELEGATION OF AUTHORITY

The Plaintiffs' "denial of equal protection" argument is inexorably interwoven with their "unconstitutional taking" argument and have been covered in the "police power" section.

The delegation of authority argument has been covered in the section on vagueness of this opinion.

It being the court's conviction that from the evidence presented before it that Chapters 854 of the Acts of 1974 and 608 of the Acts of 1975 are unconstitutional, the following Declaration is hereby issued:

DECLARATION AND INJUNCTION

Issues having been joined in the aforegoing Equity causes, stipulation of facts were received, evidence was taken, arguments of counsel were heard, briefs were received, and the proceedings read and duly considered.

WHEREUPON, it is this 27th day of January 1976 by the Circuit Court for Anne Arundel County, in Equity,

DECLARED for the reasons given in the aforegoing memorandum that Chapter 854 of the Acts of the Legislature of 1974 and Chapter 608 of the Acts of the Legislature of 1975 are unconstitutional and void.

The Defendants and their agents, employees, and all other persons serving under them are hereby enjoined from taking any action to enforce said statutes with respect to any of the parties plaintiff. Costs are to be assessed against the defendants.

E. MACKALL CHILDS,
Judge.



APPENDIX E

NOTICES OF APPEAL

*In The*
*Circuit Court For Anne Arundel County*

*Equity Nos. 22,069 and 22,502*

*Exxon Corporation and Phillips Petroleum Company,*
*Plaintiffs,*
*v.*
*Marvin Mandel, Governor, et al.,*
*Defendants.*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Exxon Corporation and
Phillips Petroleum Company
(Filed June 27, 1977)

Notice is hereby given that Exxon Corporation and Phillips Petroleum Corporation, plaintiffs in the above-captioned actions, hereby appeal to the Supreme Court of the United States from the decision of the Court of Appeals of Maryland entered on February 18, 1977 reversing the decision of this Court and remanding the case for entry of a judgment in accordance with its opinion, which decision became final upon the filing of a supplementary opinion by the Maryland Court of Appeals on April 13, 1977 denying plaintiffs' motion for reconsideration. The appeal is from that part of the decision applying to Paragraphs B, C and D of Chapter

854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975.

Pursuant to Rule 877 of the Maryland Rules of Procedure, the record in these actions is in the possession of this Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

WILLIAM L. MARBURY
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Of Counsel:
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21203



*In The Court of Appeals of Maryland*

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*September Term, 1976*

---

*No. 10*

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*Governor of The State of Maryland, et al.,*
*Appellants,*

*v.*

*Exxon Corporation, et al.,*
*Appellees.*

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## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

**By Exxon Corporation and Phillips Petroleum Company**
**(Filed June 27, 1977)**

Notice is hereby given that Exxon Corporation and Phillips Petroleum Corporation, appellees in the above-captioned action, hereby appeal to the Supreme Court of the United States from the order of the Court of Appeals of Maryland entered on February 18, 1977 reversing the judgment of the Circuit Court for Anne Arundel County and remanding the case for entry of a judgment in accordance with its opinion. Appellees' motions for reconsideration and stay of mandate were denied by the Court of Appeals on April 13, 1977. The appeal is from that part of the decision applying to Paragraphs B, C and D of Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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21203



*In The*
*Circuit Court For Anne Arundel County*

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*Equity No. 22,091*

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*Continental Oil Company, et al.,*
*Plaintiffs,*

*v.*

*Marvin Mandel, Governor, et al.,*
*Defendants.*

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# NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Continental Oil Company and
Kayo Oil Company
(Filed June 27, 1977)

Notice is hereby given that Continental Oil Company and Kayo Oil Company, plaintiffs, by their attorneys, Wilbur D. Preston, Jr., Stanley B. Rohd and Whiteford, Taylor, Preston, Trimble & Johnston, appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland reversing the judgment of the Circuit Court for Anne Arundel County, Maryland, in the above-entitled case and remanding the case for entry of a judgment in accordance with the views expressed in the Opinion of the Court of Appeals filed on February 18, 1977, and as to which the plaintiffs' motion for reconsideration was denied on April 13, 1977, and the Court's Mandate issued on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2) (1970).

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301/752-0987
Attorneys for Continental Oil
Company and Kayo Oil
Company



*In The*
*Court of Appeals of Maryland*

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*Docket No. 10*

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*September Term, 1976*

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*Governor of The State of Maryland, et al.,*
*Appellant,*

*v.*

*Exxon Corporation, et al.,*
*Appellees.*

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# NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Continental Oil Company and
Kayo Oil Company
(Filed June 27, 1977)

Notice is hereby given that Continental Oil Company and Kayo Oil Company, appellees, by their attorneys, Wilbur D. Preston, Jr., Stanley B. Rohd and Whiteford, Taylor, Preston, Trimble & Johnston, appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland reversing the judgment of the Circuit Court for Anne Arundel County, Maryland, in the above-entitled case and remanding the case for entry of a judgment in accordance with the views expressed in the Opinion of the Court of Appeals filed on February 18, 1977, and as to which the appellees' motion for reconsideration was denied on April 13, 1977, and the Court's Mandate issued on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2) (1970).

WILBUR D. PRESTON
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Attorneys for Continental Oil Company and Kayo Oil Company



*In The*
*Circuit Court For Anne Arundel County*

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*Equity No. 22,216*

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*Shell Oil Company,*
*Appellant,*

*v.*

*Marvin Mandel, Governor of the State of Maryland, et al.,*
*Appellees.*

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**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

**by Shell Oil Company**
**(Filed June 23, 1977)**

**Notice is hereby given that Shell Oil Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland, reversing the decision of the Circuit Court for Anne Arundel County that Paragraph D of Chapter 854 of the Laws of Maryland 1974 is in conflict with the federal Robinson-Patman Act. The judgment of the Court of Appeals of Maryland was entered in this action on February 18, 1977, and the petition for reconsideration was denied on April 13, 1977.**

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: June 23, 1977

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Attorneys for Appellant
Shell Oil Company



*In The*
*Court of Appeals of Maryland*

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*No. 10*

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*Shell Oil Company,*
*Appellant,*

*v.*

*Marvin Mandel, Governor of the State of Maryland, et al.,*
*Appellees.*

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## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Shell Oil Company
(Filed June 23, 1977)

Notice is hereby given that Shell Oil Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland, reversing the decision of the Circuit Court for Anne Arundel County that Paragraph D of Chapter 854 of the Laws of Maryland 1974 is in conflict with the federal Robinson-Patman Act. The judgment of the Court of Appeals of Maryland was entered in this action on February 18, 1977, and the petition for reconsideration was denied on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: June 23, 1977

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Attorneys for Appellant
Shell Oil Company



*In The*
*Circuit Court For Anne Arundel County*

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*Equity No. 22,461*

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*Gulf Oil Corporation,*
*Plaintiff,*

*v.*

*Marvin Mandel, Governor, et al.,*
*Defendants.*

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## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Gulf Oil Corporation
(Filed June 27, 1977)

Notice is given that Gulf Oil Corporation, plaintiff in Equity No. 22,461, appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland filed on February 18, 1977, upholding the constitutionality of Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975, and reversing the final decree of the Circuit Court for Anne Arundel County entered on January 27, 1976. Motions for reconsideration and stay of mandate were denied on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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301/752-4567
Attorney for
Gulf Oil Corporation



*In The*
*Court of Appeals of Maryland*

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*September Term, 1976*

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*No. 10*

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*Governor of The State of Maryland, et al.,*
*Appellants,*

*v.*

*Exxon Corporation, et al.,*
*Appellees.*

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## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Gulf Oil Corporation
(Filed June 27, 1977)

Notice is given that Gulf Oil Corporation, one of the appellees, appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland filed on February 18, 1977, upholding the constitutionality of Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975, and reversing the final decree of the Circuit Court for Anne Arundel County entered on January 27, 1976. Motions for reconsideration and stay of mandate were denied on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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301/752-4567
Attorney for
Gulf Oil Corporation



*In The*
*Circuit Court For Anne Arundel County*

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*Equity No. 22,562*

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*Ashland Oil, Inc.,*
*Plaintiff,*

*v.*

*Marvin Mandel, Governor, et al.,*
*Defendants.*

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## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Ashland Oil, Inc.
(Filed July 1, 1977)

Notice is hereby given that Ashland Oil, Inc., one of the plaintiffs in the above-captioned action, hereby appeals to the Supreme Court of the United States from the decision of the Court of Appeals of Maryland entered on February 18, 1977 reversing the decision of this Court and remanding the case for entry of a judgment in accordance with its opinion, which decision became final upon the filing of a supplementary opinion by the Maryland Court of Appeals on April 13, 1977 denying plaintiff's motion for reconsideration. The appeal is from that part of the decision applying to Paragraphs B and C of Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975.

Pursuant to Rule 877 of the Maryland Rules of Procedure, the record in these actions is in the possession of this Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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Attorneys for Plaintiff
Ashland Oil Inc.



*In The*
*Court of Appeals of Maryland*

*September Term, 1976*

*No. 10*

*Governor of The State of Maryland, et al.,*
***Appellants***

*v.*

*Exxon Corporation, et al.,*
***Appellees.***

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Ashland Oil, Inc.

(Filed July 1, 1977)

Notice is hereby given that Ashland Oil, Inc., one of the appellees in the above-captioned action, hereby appeals to the Supreme Court of the United States from the final judgment of this Court, reversing the judgment of the Circuit Court for Anne Arundel County and upholding Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975 (the "Act"). The appeal is from that part of the decision applying to Paragraphs B and C of the Act. The judgment of the Court of Appeals of Maryland was entered on February 18, 1977, and appellee's motion for reconsideration was denied on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: July 1, 1977

DAVID GINSBURG
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JAMES E. WESNER
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## APPENDIX F

**Maryland Gasoline Products Marketing Act, Maryland Annotated Code, Commercial Law Article, Section 11-301 *et seq.*:**

**§ 11-301. Definitions.**

(a) *In general.* — In this subtitle the following words have the meanings indicated.

(b) *Dealer.* — (1) "Dealer" means a person engaged in the retail sale of gasoline products under a marketing agreement, at least 30 percent of whose gross revenue is derived from the retail sale of gasoline products.

(2) "Dealer" does not include an employee of a distributor.

(c) *Distributor.* — (1) "Distributor" means a person who:

(i) Engages in the sale, consignment, or distribution of gasoline products through retail outlets which he owns or leases; and

(ii) Maintains an oral or written contractual relationship with a dealer for the sale of the products.

(2) "Distributor" includes any subsidiary or affiliated corporation in which a distributor holds at least 30 percent voting control.

(d) *Marketing agreement.* — "Marketing agreement" means an oral or written agreement between a distributor and a dealer under which the dealer is granted the right, for the purpose of engaging in the retail sale of gasoline products supplied by the distributor, to:

(1) Use a trademark, trade name, service mark, or other identifying symbol or name owned by the distributor; or

(2) Occupy premises owned, leased, or controlled by the distributor.

(e) *Person.* — "Person" includes an individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(f) *Retail sale.* — "Retail sale" means the sale of a product for purposes other than resale.

**§ 11-302. Legislative declaration; statement of public policy.**

(a) *Legislative finding and declaration.* — The General Assembly finds and declares that since the distribution and sale through marketing arrangements of petroleum products in the State vitally affect the economy of the State, and its public interest, welfare, and transportation, it is necessary to define the relationships and responsibilities of the parties to certain agreements pertaining to these marketing arrangements.

(b) *Statement of public policy.* — This subtitle constitutes a statement of the public policy of the State.

**§ 11-303. Information to be given by distributor to prospective dealer.**

Before any marketing agreement is concluded, a distributor shall disclose fully to a prospective dealer the following information:

(1) Any gallonage history of the location under negotiation for the shorter of:

(i) The three-year period immediately past; or

(ii) The entire period during which the location has been supplied by the distributor;

(2) The name, last known address, and reason for the termination of the marketing agreement of each person who was a dealer at the location during:

(i) The five-year period immediately past; or

(ii) The entire period during which the location has been supplied by the distributor;



(3) Any commitment for the sale, demolition, or other disposition of the location;

(4) Any training program and any specific goods and services which the distributor will provide for and to the dealer;

(5) Any obligation which will be required of the dealer;

(6) Any restriction on the sale, transfer, and termination of the agreement; and

(7) The total amount of any cash deposit required, any amount of interest to be paid on the deposit, and the conditions for the return of the deposit.

**§ 11-304. Marketing agreement subject to certain provisions.**

(a) *In general.* — Every marketing agreement is subject to the provisions of this section, whether or not expressly set forth in the agreement.

(b) *Dealer's right to cancel.* — (1) Until midnight of the seventh business day after the day a marketing agreement is signed or entered into, the dealer may cancel it by giving written notice of cancellation to the distributor in person or by registered or certified mail.

(2) Within 10 days after delivery of the notice of cancellation, the dealer shall return to the distributor full possession of any service station, location, money, equipment, or merchandise loaned, sold, or delivered under the marketing agreement to the dealer by the distributor.

(3) The distributor shall give the dealer full credit or its cash equivalent for all money, equipment, and merchandise returned.

(c) *Price setting.* — The distributor may not set or maintain or attempt to set or maintain the price at which the dealer sells any product, and the price of any product may not be subject to enforcement or coercion by the distributor in any way. However, the distributor

may counsel with the dealer concerning prices and may suggest prices to him.

(d) *Hours of business.* — A distributor may only require a dealer to keep his retail outlet open for business for a specified number of hours per day or days per week when this requirement is negotiated in good faith by both parties and arrived at in mutual agreement and it is on the basis of a bona fide business need.

(e) *Promotions.* — The distributor may not require the dealer to use any promotion, premium, coupon, give-away, or rebate in the operation of the business. However, if not otherwise prohibited by law, the dealer may participate in a promotional, premium, coupon, give-away, or rebate program sponsored by the distributor.

(f) *Notice of intent not to renew.* — A party who intends not to renew a marketing agreement shall give notice of his intent to the party at least 90 days before the expiration of the term of the marketing agreement.

(g) *Distributor may not unreasonably withhold certain consents.* — The distributor may not unreasonably withhold his consent to any assignment, transfer, sale, or renewal of a marketing agreement.

(h) *Repurchase on termination or cancellation.* — (1) Except with respect to a cancellation to which subsection (b) of this section applies, within 30 days after the date a marketing agreement is terminated or cancelled, whether by mutual agreement or otherwise, the distributor shall repurchase from the dealer at the then current wholesale price all merchantable products purchased by the dealer from the distributor.

(2) The distributor may apply the proceeds of any repurchased product against any existing debt owed by the dealer to the distributor.

(3) The obligation to repurchase under this subsection is enforceable only to the extent that there are no



other valid claims or liens against the products by or on behalf of other creditors of the dealer.

(i) *Payment for goodwill.* — (1) In addition to the provisions of subsection (h) of this section, if, without the written consent of the dealer, the distributor terminates, cancels, or unreasonably refuses to renew the marketing agreement, the distributor shall pay to the dealer the full value of any business goodwill which the dealer enjoys at the time he is notified of the termination, cancellation, or refusal to renew.

(2) The distributor shall make the payment required by this subsection within 30 days from the effective date of the termination, cancellation, or refusal to renew.

(3) This subsection does not apply if the dealer materially breaches the marketing agreement.

(j) *Agreement may not waive certain rights.* — The marketing agreement may not waive the right of either party to trial by jury or interposition of counter-claims or cross-claims.

(k) *Service station lease providing for minimum monthly rental.* — A clause in any lease or contract from a producer or refiner to a dealer for the use of a retail service station providing for a minimum monthly rental based on a certain volume of sales is not enforceable to the extent the minimum rent exceeds a sum equal to the minimum rent provided for in the lease or contract times a fraction, the denominator of which is the number of gallons of gasoline on which the minimum rent is based and the numerator of which is the number of gallons of gasoline made available by the producer or refiner to the dealer for that month.

**§ 11-305. Defenses to action based on termination or cancellation of marketing agreement.**

Subject to the notice requirements of § 11-306, in any action filed under this subtitle which is based on a termination or cancellation of a marketing agreement,

it is a defense that the marketing agreement was terminated or cancelled:

(1) By mutual agreement of the parties;

(2) Because of the bankruptcy or insolvency of the dealer;

(3) Because the dealer failed to comply with an express requirement of the marketing agreement; or

(4) Because the dealer failed to act in good faith in carrying out the terms of the marketing agreement.

**§ 11-306. Notice of intent required to raise defenses.**

(a) *Notice required to raise defense.* — A party to a marketing agreement may not raise any defense set out in § 11-305 unless he gives written notice to the other party of his intent to terminate or cancel the agreement. This notice shall be given in person or by registered or certified mail at least 60 days before the date on which he intends to terminate or cancel it.

(b) *When notice not required.* — The 60-day notice is not required if at the time of termination or cancellation of the marketing agreement any of the following is proven:

(1) Criminal misconduct;

(2) Fraud;

(3) Abandonment;

(4) Bankruptcy or insolvency of the dealer;

(5) Adulteration of product; or

(6) Giving a check which is dishonored for insufficient funds.

(c) *Notice by registered or certified mail.* — If notice is given by registered or certified mail, it shall be effective on the date of mailing.

**§ 11-307. Remedies.**

Any person who violates any provision of this subtitle is liable for damages caused by the violation



and is subject to the other legal or equitable remedies available to the party injured by the violation.

**§ 11-308. Short title.**

This subtitle may be cited as the Maryland Gasoline Products Marketing Act.

**Maryland Unfair Sales Act, Maryland Annotated Code, Commercial Law Article, Section 11-401 *et seq.*:**

**§ 11-401. Definitions.**

(a) *In general.* — In this subtitle the following words have the meanings indicated.

(b) *Cost to the retailer.* — "Cost to the retailer" means the lesser of the invoice cost or the replacement cost of the merchandise to the retailer; minus any trade discount other than a customary discount for cash; plus

(1) A freight charge otherwise not included in the invoice cost or the replacement cost of the merchandise;

(2) A cartage cost to the retail outlet if performed or paid for by the retailer, which, in the absence of proof of a lesser cost, is 0.75 percent of the cost to the retailer, after adding the freight charge but before adding the cartage cost and any markup;

(3) A markup to cover in part the cost of doing business, which, in the absence of proof of a lesser cost, is 5 percent of the cost to the retailer, after adding the freight charge and the cartage cost but before adding any markup; and

(4) An additional markup to cover in part the cost of doing business which, in the absence of proof of a lesser cost, is 2 percent of the cost to the retailer, after adding the freight charge and the cartage cost but before adding any markup, if the retailer:

(i) Buys at wholesale or buys directly from the manufacturer or the agent or broker of the manufacturer; and

(ii) Receives a wholesale price or discount on merchandise for retail sale.

(c) *Cost to the wholesaler.* — "Cost to the wholesaler" means the lesser of the invoice cost or the replacement cost of the merchandise to the wholesaler; minus any discount other than a customary discount for cash; plus:

(1) A freight charge otherwise not included in the invoice cost or the replacement cost of the merchandise;

(2) A cartage cost to the retail outlet if performed or paid for by the wholesaler, which, in the absence of proof of a lesser cost, is 0.75 percent of the cost to the wholesaler, after adding the freight charge but before adding the cartage cost and any markup; and

(3) A markup to cover in part the cost of doing business, which, in the absence of proof of a lesser cost, is 2 percent of the cost to the wholesaler, after adding the freight charge and the cartage cost but before adding any markup.

(d) *Person.* — "Person" includes an individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(e) *Replacement cost.* — "Replacement cost" means the cost per unit for which the merchandise sold or offered for sale could have been bought by the wholesaler or retailer at any time within 30 days before the date of sale or the date on which it is offered for sale by him if bought in the same quantity as his last purchase of the merchandise.

(f) *Retailer.* — (1) "Retailer" means a person engaged in the business of making retail sales within the state.

(2) If the person is engaged in the business of making both retail sales and wholesale sales, the word applies only to the retail sales portion of the business.



(g) *Retail sale.* — (1) "Retail sale" means any transfer of title to tangible personal property for valuable consideration and in the ordinary course of trade or in the usual conduct of the seller's business, to a purchaser for consumption or use other than resale, further processing, or manufacturing.

(2) "Retail sale" includes any such transfer of the property whereby title is retained by the seller as security for the payment of the purchase price.

(h) *Wholesaler.* — (1) "Wholesaler" means a person engaged in the business of making wholesale sales within the state.

(2) If a person is engaged in the business of making both wholesale sales and retail sales, the word applies only to the wholesale sales portion of the business.

(i) *Wholesale sale.* — (1) "Wholesale sale" means any transfer of title to tangible personal property for valuable consideration and in the ordinary course of trade or the usual conduct of the seller's business, to a purchaser for the purpose of resale, further processing, or manufacturing.

(2) "Wholesale sale" includes any such transfer of the property whereby title is retained by the seller as security for the payment of the purchase price.

**§ 11-402. Exceptions.**

This subtitle does not apply to an advertisement, offer to sell, retail sale, or wholesale sale, if the merchandise:

(1) Is sold in a bona fide clearance sale and is so advertised and marked;

(2) Must be sold promptly in order to prevent loss;

(3) Is imperfect, damaged, or being discontinued and is so advertised and marked;

(4) Is sold on the final liquidation of a business;

(5) Is sold for charitable purposes or to relief agencies;

(6) Is sold on contract to a department of a government or governmental institution;

(7) Is sold by an officer acting under the order or direction of a court; or

**§ 11-403. Advertised, offered for sale, or sold.**

For the purposes of this subtitle, if an item of merchandise is advertised, offered for sale, or sold with any other item at a combined price, or is advertised, offered as a gift, or given with the sale of any other item, all of the items are considered to be advertised, offered for sale, or sold. The cost to the wholesaler and the cost to the retailer, as the case may be, of each item is governed by § 11-401 (b) and (c), respectively, of this subtitle.

**§ 11-404. Sale at less than cost prohibited.**

(a) *Prohibition.* — A retailer or wholesaler with intent to injure a competitor or to destroy competition may not advertise, offer to sell, or sell at retail sale or wholesale sale any item of merchandise at less than its cost to the retailer or its cost to the wholesaler, respectively.

(b) *Evidence.* — Proof of an advertisement, offer to sell, or sale of an item of merchandise by a retailer or wholesaler at less than its cost to the retailer or its cost to the wholesaler, respectively, is prima facie evidence of intent to injure a competitor or to destroy competition.

**§ 11-405. Injunction.**

On complaint of a person who claims to be injured, a circuit court has jurisdiction to enjoin a retailer or wholesaler from the commission of an act prohibited by this subtitle.

**§ 11-406. Short title.**

This subtitle may be cited as the Maryland Unfair Sales Act.